IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1905.

The State of Kansas,

*Complainant,*

vs.

The United States of America, Ethan Allen Hitchcock, Secretary of the Interior, Francis E. Leupp, Commissioner of Indian Affairs, Tams Bixby, Commissioner to the Five Civilized Tribes, J. George Wright, United States Indian Inspector for the Indian Territory, Dana H. Kelsey, United States Indian Agent for the Indians of the Union Agency in the Indian Territory, the Muskogee or Creek Nation or Tribe of Indians, Pleasant Porter, Principal Chief of the Muskogee or Creek Nation or Tribe of Indians, William Fisher and Joseph Fisher, citizens and residents of the State of Texas; Cornelius L. Bonham, citizen and resident of the State of Illinois; Michael Fitzpatrick and Jennie C. Fitzpatrick, citizens and residents of the State of Illinois; George F. Roth, citizen and resident of the State of Illinois; Samuel Johnson and Elmer Johnson, citizens and residents of the State of Missouri, John F. Ingram, David Whitlow, George W. Grayson, Napoleon B. Moore, Conny Murphy, David A. Lee, Googan Sarty, James Childres, W. B. Rogers, Alexander L. Posey, Wm. N. Moore, Temiye Kernells, John Jefferson, Henry C. Reed, Sam Grayson, George Malvern, Jake (A. J.) Berryhill, Wattey Yahola, George Marshall, Robert Bruner, Sarah A. Asbill, and Jake Smith for themselves and all other allottees of land in the Muskogee or Creek Nation whose allotments in whole or in part are included within every alternate section of land or parts thereof designated by odd numbers to the extent of ten sections per mile on each side of the Missouri, Kansas & Texas Railway and within twenty miles of the line of said road, and all persons holding under said allottees or any of them,

*Defendants.*

11 Orig'l.
C. T. 1906

No. 25,

ORIGINAL.

## IN EQUITY.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT.


CHILES C. COLEMAN,
Solicitor for and Attorney-General
of the State of Kansas.

JOSEPH H. CHOATE,
JAMES HAGERMAN,
ADRIAN H. JOLINE,
A. B. BROWNE,
JOHN MADDEN,
JOSEPH M. BRYSON,
Of Counsel.


Nixon-Jones Ptg. Co., 215 Pine St., St. Louis.

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Now comes the State of Kansas, by and through its Attorney General and moves the Court for leave to file

the bill of complaint herewith exhibited in a controversy which has arisen between said State and the Defendants named in the above entitled cause and that proper process may issue thereon.

CHILES C. COLEMAN,
Solicitor for and Attorney General
of the State of Kansas.

JOSEPH H. CHOATE,
JAMES HAGERMAN,
ADRIAN H. JOLINE,
A. B. BROWNE,
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*Defendants.*

No. ——

ORIGINAL.

## IN EQUITY.

*To the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your oratrix, the State of Kansas, complainant, by Chiles C. Coleman, Attorney-General of said State, by leave of Court first had and obtained, brings this its

bill of complaint against the defendants, The United States of America, Ethan Allen Hitchcock, a citizen of the State of Missouri, Secretary of the Interior; Francis E. Leupp, a citizen and resident of the State of New York, Commissioner of Indian Affairs; Tams Bixby, a citizen of the State of Minnesota, Commissioner to the Five Civilized Tribes; J. George Wright, a citizen of the State of Illinois, United States Indian Inspector for the Indian Territory; Dana H. Kelsey, a citizen of the United States and a resident of the Indian Territory, United States Indian Agent for the Indians of the Union Agency in the Indian Territory; the Muskogee or Creek Nation or Tribe of Indians; Pleasant Porter, a citizen of the Indian Territory, Principal Chief of the Muskogee or Creek Nation or Tribe of Indians; William Fisher and Joseph Fisher, citizens and residents of the State of Texas; Cornelius L. Bonham, citizen and resident of the State of Illinois; Michael Fitzpatrick and Jennie C. Fitzpatrick, citizens and residents of the State of Illinois; George F. Roth, citizen and resident of the State of Illinois; Samuel Johnson and Elmer Johnson, citizens and residents of the State of Missouri; John F. Ingram, David Whitlow, George W. Grayson, Napoleon B. Moore, Conny Murphy, David A. Lee, Googan Sarty, James Childres, W. B. Rogers, Alexander L. Posey, Wm. N. Moore, Temiye Kernells, John Jefferson, Henry C. Reed, Sam Grayson, George Malvern, Jake (A. J.) Berryhill, Wattey Yahola, George Marshall, Robert Bruner, Sarah A. Asbill, and Jake Smith, citizens of the United States and residents of the Indian Territory, for themselves and all other allottees of land in the Muskogee or Creek Nation, whose allotments in whole or in part are included within every alternate section of land or parts thereof designated by odd numbers to the extent of ten sections per mile on each side of the Missouri, Kansas & Texas

Railway and within twenty miles of the line of said road, and all persons holding under said allottees or any of them. And thereupon your oratrix complains and says:

That your oratrix, the State of Kansas, was by the Acts of Congress hereinafter specifically referred to, granted certain lands in the Indian Territory, and the lands hereinafter specifically described, as well as other lands, to aid in the construction of a line of railway through the Indian Territory, and which was, as is hereinafter alleged, constructed through said Territory by the Missouri, Kansas & Texas Railway Company.

Further complaining, your oratrix states that the defendant, Ethan Allen Hitchcock, is Secretary of the Interior of the United States, and a citizen and resident of the State of Missouri; that the defendant Francis E. Leupp is Commissioner of Indian Affairs of the United States, and a citizen and resident of the State of New York; that the defendant, Tams Bixby, is Commissioner to the Five Civilized Tribes, and a citizen and resident of the State of Minnesota; that the defendant, J. George Wright, is United States Indian Inspector for the Indian Territory, and a citizen and resident of Illinois; that the defendant, Dana H. Kelsey, is United States Indian Agent for the Indians of the Union Agency in the Indian Territory, and is a citizen of the United States and resident of the Indian Territory; and that the defendant, Pleasant Porter, is Principal Chief of the Muskogee or Creek Nation or Tribe of Indians, and is a citizen of the United States and a resident of the Indian Territory, and that said defendants in their official capacities have made and assisted in making and are making, and assisting in making, certain conveyances to other persons and parties of the lands claimed and owned by your oratrix, located within the limits of the Muskogee or

Creek Nation in the Indian Territory, as hereinafter shown.

Your oratrix further represents and shows unto this Honorable Court that all of the lands lying and now being in the Creek Nation, consisting of odd numbered sections to the extent of ten sections per mile on each side of the Missouri, Kansas & Texas Railway and within twenty miles of the line of said railroad, were granted unto your oratrix by the Acts of Congress of July 25th and 26th, 1866, hereinafter set out, and are now claimed and owned by your oratrix and are more particularly described as follows, to-wit: —

All of sections 1, 3, 11, 13, 15, 23, 25, 27 and 35 in Twp. 19 N. R., 15 east, and also the following described fractional parts of sections 9, 21, 33 in said Twp. and range described as follows: The east half of the east half of section 9, the east half of section 21, the east half of section 33 and the east half of the west half of section 33; all of section 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35 in Twp. 19 N. R., 16 east.;

All of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35 in Twp. 19 N. R. 17 E.; all of sections 3, 5, 7, 9, 11, 15, 17, 19, 21, 23, 27, 29, 31, 33 and 35 in Twp. 19 N. R. 18 E.; also the following described fractional parts of sections 1, 13 and 25 in said Twp. and range, described as follows: All that part of said sections 1, 13 and 25 lying within the boundary line of the Creek Nation;

All of sections 1, 3, 9, 11, 13, 15, 21, 23, 25, 27, 33 and 35 in Twp. 18 N. R. 15 E., and also the following described fractional parts of sections 17 and 29 in said Twp. and range, described as follows: The east half of the east half of section 17, and the east half of section 29;

All of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35 in Twp. 18 N. R. 16 E.;

All of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35 in Twp. 18 N. R. 17 E.;

All of sections 3, 5, 7, 9, 11, 15, 17, 19, 21, 23, 27, 29, 31, 33 and 35 in Twp. 18 N. R. 18 E., and also the following described fractional parts of sections 1, 13 and 25 of said Twp. and range, described as follows: All that part of said section 1, 13 and 25 lying within the boundary lines of the Creek Nation;

All of sections 1, 3, 9, 11, 13, 15, 21, 23, 25, 27, 33 and 35 in Twp. 17 N. R. 15 E., and also the following described fractional parts of sections 17 and 29 in said Twp. and range, described as follows: The east half of the east half of section 17, the northwest quarter of the northeast quarter of section 17, and the northeast quarter of the northeast quarter of section 29;

All of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35 in Twp. 17 N. R. 16 E.;

All of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35 in Twp. 17 N. R. 17 E.;

All of sections 3, 5, 7, 9, 11, 15, 17, 19, 21, 23, 27, 29, 31, 33 and 35 in Twp. 17 N. R. 18 E., and also the following described fractional parts of sections 1, 13 and 25 in said Twp. and range, described as follows: All that part of said sections 1, 13 and 25 lying within the boundary lines of the Creek Nation;

All of sections 1, 3, 11, 13, 15, 23, 25, 27 and 35 in Twp. 16 N. R. 15 E., and also the following described fractional parts of sections 9, 21 and 33 of said Twp. and range, described as follows: The east half of section 9, the east half of the northeast quarter of section 21, the southeast quarter of section 33 and the east half of the northeast quarter of section 33;

All of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35 in Twp. 16 N. R. 16 E.;

All of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35 in Twp. 16 N. R. 17 E.;

All of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35 in Twp. 16 N. R. 18 E.;

All of the following described fractional parts of sections 7, 19 and 31 in Twp. 16 N. R. 19 E., described as follows: All that part of said sections 7, 19 and 31 lying within the boundary lines of the Creek Nation.

The east half of the southeast quarter of section 25, Twp. 15 N. R. 14 E.;

All of sections 1, 3, 9, 11, 13, 15, 21, 23, 25, 27, 29, 31, 33 and 35 in Twp. 15 N. R. 15 E., and also the following described fractional parts of sections 5, 17 and 19 in said Twp. and range, described as follows: The southeast quarter of the southeast quarter of section 5, the east half of section 17, the southwest quarter of section 17, the east half of the northwest quarter of section 17, the southwest quarter of the northwest quarter of section 17, the southeast quarter of section 19, the east half of the southwest quarter of section 19, the east half of the northeast quarter of section 19, and the southwest quarter of the northeast quarter of section 19;

All of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35 in Twp. 15 N. R. 16 E.;

All of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35 in Twp. 15 N. R. 17 E.;

All of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35 in Twp. 15 N. R. 18 E.;

All of section 7 in Twp. 15 N. R. 19 E.; also the following described fractional parts of sections 5, 9, 17, 19 and 31 in said Twp. and range, described as follows: All

that part of said sections 5, 9, 17, 19 and 31 lying within the boundary lines of the Creek Nation;

All of sections 1, 13, 23, 25 and 35 in Twp. 14 N. R. 14 E., and also the following described fractional parts of sections 11, 15, 27 and 33 in said Twp. and range, described as follows: The east half of section 11, the southeast quarter of the northwest quarter of section 11, the east half of the southwest quarter of section 11, and the southwest quarter of the southwest quarter of section 11, the east half of the southeast quarter of section 15, and the southeast quarter of the northeast quarter of section 15, the east half of section 27, the southwest quarter of section 27, the east half of the northwest quarter of section 27, the southwest quarter of the northwest quarter of section 27, the east half of the east half of section 33, and the southwest quarter of the southeast quarter section 33;

All of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35 in Twp. 14 N. R. 15 E.;

All of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35 in Twp. 14 N. R. 16 E.;

All of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35 in Twp. 14 N. R. 17 E.;

All of sections 3, 5, 7, 9, 11, 15, 17, 19, 21, 27, 29, 31, and 33 in Twp. 14 N. R. 18 E., and also the following described fractional parts of sections 1, 13, 23 and 35 in said Twp. and range, described as follows: All that part of said sections 1, 13, 23 and 35 lying within the boundary lines of the Creek Nation;

All of sections 1, 3, 11, 13, 15, 21, 23, 25, 27, 33 and 35 in Twp. 13 N. R. 14 E., and also the following described fractional parts of sections 9, 17, 29 and 31 in said Twp. and range, described as follows: The east half of section 9, the southwest quarter of section 9, the east half

of the northwest quarter of section 9, the east half of the southeast quarter of section 17, the east half of section 29, the southwest quarter of section 29, the east half of the northwest quarter of section 29, the southeast quarter of section 31, and the east half of the northeast quarter of section 31;

All of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35 in Twp. 13 N. R. 15 E.;

All of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35 in Twp. 13 N. R. 16 E.;

All of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35 in Twp. 13 N. R. 17 E.;

All of sections 5, 7, 9, 17, 19, 29 and 31 in Twp. 13 N. R. 18 E., and also the following described fractional parts of sections 3, 15, 21 and 33 in said Twp. and range, described as follows: All that part of said sections 3, 15, 21 and 33 lying within the boundary lines of the Creek Nation;

All the following described fractional parts of sections 13, 25 and 35 in Twp. 12 N. R. 13 E., described as follows: The southeast quarter of section 13, the east half of the northeast quarter of section 13, and the southwest quarter of northeast quarter of section 13, the east half of section 25, the southwest quarter of section 25, the east half of the northwest quarter of section 25, the southwest quarter of the northwest quarter of section 25, and the east half of the east half of section 35;

All of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35 in Twp. 12 N. R. 14 E.;

All of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35 in Twp. 12 N. R. 15 E.;

All of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35 in Twp. 12 N. R. 16 E.;

All of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35 in Twp. 12 N. R. 17 E.;

All of section 7 in Twp. 12 N. R. 18 E., and also the following described fractional parts of sections 5, 17, 19, and 31 in said Twp. and range, described as follows: All that part of said sections 5, 17, 19 and 31 lying within the boundary lines of the Creek Nation;

All of sections 1, 13, 23, 25 and 35 in Twp. 11 N. R. 13 E., and also the following described fractional parts of sections 11 and 27 in said Twp. and range, described as follows: The east half of section 11, the east half of the west half of section 11, the east half of the east half of section 27, and the southwest quarter of the southeast quarter of section 27;

All of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35 in Twp. 11 N. R. 14 E.;

All of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35 in Twp. 11 N. R. 15 E.;

All of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35 in Twp. 11 N. R. 16 E.;

All of sections 3, 5, 7, 9, 11, 15, 17, 19, 21, 27, 29, 31 and 33 in Twp. 11 N. R. 17 E., also the following described fractional parts of sections 1, 13, 23 and 35 in said Twp. and range, described as follows: All that part of said sections 1, 13, 23 and 35 lying within the boundary lines of the Creek Nation;

All of sections 1, 11, 13, 15, 21, 23, 25, 27, 29, 33 and 35 in Twp. 10 N. R. 13 E., and also the following described fractional parts of sections 3, 9, 17 and 31 in said Twp. and range, described as follows: The east half of section 3, the southeast quarter of the northwest quarter of section 3, the east half of the southwest quarter of section 3, the southwest quarter of the southwest quarter of section 3, the southeast quarter of section 9, the south-

east quarter of the northeast quarter of section 9, the southeast quarter of the southwest quarter of section 9, the east half of the southeast quarter of section 17, the southwest quarter of the southeast quarter of section 17, the east half of section 31, the southeast quarter of the northwest quarter of section 31, the east half of the southwest quarter of section 31, and the southwest quarter of the southwest quarter of section 31;

All of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35 in Twp. 10 N. R. 14 E.;

All of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35 in Twp. 10 N. R. 15 E.;

All of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35 in Twp. 10 N. R. 16 E.;

All of sections 5, 7, 9, 17, 19, 29 and 31 in Twp. 10 N. R. 17 E., and also the following described fractional parts of sections 3, 21 and 33 in said Twp. and range, described as follows: All that part of said sections 3, 21 and 33 lying within the boundary lines of the Creek Nation;

All of sections 13 and 25 in Twp. 9 N. R. 12 E., and also the following described fractional parts of section 1, 23 and 35 in said Twp. and range, described as follows: The southeast quarter of the northeast quarter of section 1, the east half of the southeast quarter of section 1, the southwest quarter of the southeast quarter of section 1, the east half of the east half of section 23, the southwest quarter of the southeast quarter of section 23, the east half of section 35, the southwest quarter of section 35, and the east half of the northwest quarter of section 35;

All of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35 in Twp. 9 N. R. 13 E.;

All of sections 1, 3, 5, 7, 9, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35 in Twp. 9 N. R. 14 E.;

All of sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 27, 29, 31 and 33 in Twp. 9 N. R. 15 E., and also the following described fractional parts of section 25 and 35 in said Twp. and range, described as follows: All that part of said sections 25 and 35 lying within the boundary lines of the Creek Nation;

All of sections 1, 3, 5, 7, 9 and 11 in Twp. 9 N. R. 16 E., and also the following described fractional parts of sections 13, 15, 17, 19, 23 and 27 in said Twp. and range, described as follows: All that part of said sections 13, 15, 17, 19, 23 and 27 lying within the boundary lines of the Creek Nation;

All of section 5 in Twp. 9 N. R. 17 E., and also the following described fractional parts of sections 7 and 9 in said Twp. and range, described as follows: All that part of said sections 7 and 9 lying within the boundary lines of the Creek Nation;

All of sections 1, 11, 13, 27 and 33 in Twp. 8 N., R. 12 E., and also the following described fractional parts of sections 3, 15, 21, 23 and 35 in said Twp. and range, described as follows: The southeast quarter of the southeast quarter of section 3, the east half of section 15, the southeast quarter of the northwest quarter of section 15, the east half of the southwest quarter of section 15, the southwest quarter of the southwest quarter of section 15, the southeast quarter of section 21, the southeast quarter of the northeast quarter of section 21, and all that part of sections 23 and 35 lying within the boundary lines of the Creek Nation;

All of sections 1, 3, 5, 7, 9, 11, 15 and 17 in Twp. 8 N. R. 13 E., and also the following described fractional parts of sections 13, 19, 21, 23 and 27 in said Twp. and

range, described as follows: All that part of said sections 13, 19, 21, 23 and 27 lying within the boundary lines of the Creek Nation;

All of section 5 in Twp. 8 N. R. 14 E., and also the following described fractional parts of sections 1, 3, 7 and 9 in said Twp. and range, described as follows: All that part of said sections 1, 3, 7 and 9 lying within the boundary lines of the Creek Nation; all that part of sections 3, 5 and 7 in Twp. 8 N. R. 15 E., lying within the boundary lines of the Creek Nation;

The following described fractional parts of section 25 in Twp 7 N. R. 11 E., described as follows: The east half of the northeast quarter of section 25, the southwest quarter of the northeast quarter of section 25, and all that part of the southeast quarter of section 25 lying within the boundary lines of the Creek Nation;

All of sections 19 in Twp. 7 N. R. 12 E., and also the following described fractional parts of sections 5, 7 and 17 in said Twp. and range, described as follows: The east half of section 5, the southwest quarter of section 5, the east half of the northwest quarter of section 5, the southeast quarter of section 7, the east half of the northeast quarter of section 7 and all that part of section 17 lying within the boundary lines of the Creek Nation.

All of which will be more particularly shown by a map to be presented at the hearing hereof, and a copy of which is attached hereto, wherein the said odd numbered sections appear according to the plats and surveys of the United States. The said odd numbered sections comprise five hundred sixteen thousand four hundred eighty (516,480) acres of land, more or less; and the said United States and the said Creek Nation, acting through their ministerial officers, have wrongfully, as against the rights of your oratrix, attempted to allot the greater part of said land,

and are allotting the remainder, to numerous allottees, citizens and members of the Creek Nation, many of whom have sold or attempted to sell and convey portions of their allotments to citizens and residents of various States of the United States, and the names and places of residence of most of said allottees and the parties to whom they have attempted to sell portions of their allotments cannot with any diligence be secured by your oratrix. The number of members and citizens to whom allotments have been made is about five thousand.

Your oratrix further shows that each and all of said allottees and those claiming under them claim title under a common chain of title and in the same interest, and against the interest and claim of your oratrix, and that they are too numerous to be made parties defendant and to have process served upon them without manifest inconvenience and oppressive delay, and that your oratrix is entitled to select, and has selected, the defendants, John F. Ingram, David Whitlow, George W. Grayson, Napoleon B. Moore, Conny Murphy, David A. Lee, Googan Sarty, James Childres, W. B. Rogers, Alexander L. Posey, Wm. N. Moore, Temiye Kernells, John Jefferson, Henry C. Reed, Sam Grayson, George Malvern, Jake (A. J.) Berryhill, Wattey Yahola, William Fisher, Joseph Fisher, George Marshall, Cornelius L. Bonham, Robert Bruner, Michael Fitzpatrick, Jennie C. Fitzpatrick, Sarah A. Asbill, George F. Roth, Jake Smith, Samuel Johnson, Elmer Johnson; and has made them defendants as representing the common interest of all of the said allottees and all persons holding under said allottees or any of them. The lands allotted to said defendant allottees respectively are described as follows:

John F. Ingram, NW4 of NW4 of Sec. 11, T. 9 N., R. 16 E., 40 acres more or less; David Whitlow, N2 of NW4, SE4 of NW4, E2 of SW4 of NW4, Sec. 35, T. 10 N., R. 16 E., 140 acres more or less; George W. Grayson, W2

of SW4, Sec. 9, T. 10 N., R. 16 E., 80 acres more or less; Napoleon B. Moore, NE4 Sec. 7, T. 15 N., R. 16 E., 160 acres more or less; Conny Murphy, NE4 of Sec. 17, T. 16 N., R. 16 E., 160 acres more or less; David A. Lee, SE4 of Sec. 25, T. 14 N., R. 15 E., 160 acres more or less; Googan Sarty, N2 of SW4, NW4 of SE4, SE4 of NW4, Sec. 29, T. 17 N., R. 16 E., 160 acres more or less; James Childres, NW4 Sec. 23, T. 18 N., R. 16 E., 160 acres more or less; W. B. Rogers, SW4 of Sec. 27, T. 12 N., R. 17 E., 160 acres more or less; Alexander L. Posey, NE4 of Sec. 17, T. 10 N., R. 15 E., 160 acres more or less; Wm. N. Moore, E2 of NE4 of Sec. 31, T, 13 N., R. 14 E., 80 acres more or less; Temiye Kernells, SW4 of Sec. 5, T. 12 N., R. 15 E., 160 acres more or less; John Jefferson, E2 of SE4, NW4 of SE4, N2 of SW4 of SE4, and SE4 of SW4 of SE4, Sec. 9, T. 14 N., R. 15 E., 150 acres more or less; Henry C. Reed, NE4 of Sec. 13, T. 14 N., R. 15 E., 160 acres more or less; Sam Grayson, SW4 of SW4 of Sec. 3, T. 9 N., R. 16 E., 40 acres more or less; George Malvern, NW4 of Sec. 35, T. 12 N., R. 17 E., 160 acres more or less; Jake (A.J.) Berryhill, NE4 of Sec. 7, T. 13 N., R. 18 E., 160 acres more or less; Wattey Yahola, W2 of SE4, and NE4 of SE4, Sec. 27, T. 14 N., R. 18 E., George Marshall, SE4 of SW4, Sec. 21, T. 17 N., R. 17 E., Robert Bruner, SW4 of Sec. 13, T. 18 N., R. 18 E.; Sarah A. Asbill, SW4 of SE4 and W2 of SE4 of SE4 and E2 of SE4 of SW4, Sec. 25, T. 12 N., R. 17 E.; Jake Smith, N2 of SW4 of SW4 and N2 of SE4 of SW4, Sec. 13, T. 16 N., R. 16 E.

The said allottee-defendant, Wattey Yahola, under the claimed right so to do, has sold and conveyed that portion of his allotment described as follows: W2 of SE4, and NE4 of SE4, Sec. 27, T. 14 N., R. 18 E., and the said defendant, William Fisher and Joseph Fisher, citizens and residents of the State of Texas, now claim to own the same and

are in possession thereof; and the said allottee-defendant, George Marshall, under the claimed right so to do, has sold and conveyed that portion of his allotment described as follows: SE4 of SW4, Sec. 21, T. 17 N., R. 17 E., and the said defendant, Cornelius L. Bonham, citizen and resident of the State of Illinois, now claims to own the same and is in possession thereof; and the said allottee-defendant, Robert Bruner, under the claimed right so to do, has sold and conveyed that portion of his allotment described as follows: SW4 of Sec. 13, T. 18 N., R. 18 E., and the said defendants, Michael Fitzpatrick and Jennie C. Fitzpatrick, citizens and residents of the State of Illinois, now claim to own the same and are in possession thereof; and the said allottee-defendant, Sarah A. Asbill, under the claimed right so to do, has sold and conveyed that portion of her allotment described as follows: SW4 of SE4 and W2 of SE4 of SE4 and E2 of SE4 of SW4, Sec. 25, T. 12 N., R. 17 E., and the said defendant, George F. Roth, citizen and resident of the State of Illinois, now claims to own the same and is in possession thereof; and the said allottee-defendant, Jake Smith, under the claimed right so to do, has sold and conveyed that portion of his allotment described as follows: N2 of SW4 of SW4 and N2 of SE4 of SW4, Sec. 13, T. 16 N., R. 16 E., and the said defendants, Samuel Johnson and Elmer Johnson, citizens and residents of the State of Missouri, now claim to own the same and are in possession thereof.

That the said named defendant allottees and those claiming under them are men of such standing and character in their relations to the other allottees and those holding under them as to fairly represent the interests of all the allottees and those holding under them herein above referred to.

Your oratrix further shows that the defendant the Creek Nation, and the defendant Pleasant Porter, as Principal

Chief of said Nation, are charged by law and the usages and customs of the Creek Nation with the duty of defending the title to the said allotted lands, and in pursuance of that duty have requested the defendant Hitchcock, the Secretary of the Interior, and Francis E. Leupp, United States Indian Commissioner, for and on behalf of the United States, to defend the title of said lands to said allottees and those claiming under them, and that the Secretary of the Interior and the United States Indian Commissioner claim that they are charged by law with the duty, and have charged themselves with the duty, of defending the titles of the said allottees against your oratrix notwithstanding the prior express grant of said lands to your oratrix, and accordingly the Secretary of the Interior has requested the Attorney General of the United States to defend all suits involving the titles of the allottees to the said lands, and the Department of Justice, acting through the Attorney General, has charged itself with the duty of defending the titles of the allottees to said lands against your oratrix.

The Creek Nation embraces 3,079,094.61 acres of land, of which an area of 19,632.80 acres is reserved from allotment for various purposes, and, as shown by the last report of the Commission to the Five Civilized Tribes of June 30, 1905, 2,453,042.40 acres have been allotted, leaving 606,419.41 acres still subject to allotment but generally speaking all lands within twenty miles of the Missouri, Kansas & Texas Railway have been allotted.

Further complaining, your oratrix states that the Missouri, Kansas & Texas Railway Company is a corporation, duly organized, created and existing under and by virtue of the laws of the State of Kansas, and was duly incorporated on September 20th, 1865, under the laws of the State of Kansas under and by the name

of the Union Pacific Railway Company, Southern Branch, with power to build, maintain and operate a railroad commencing at or near Fort Riley, Kansas, thence in a southeasterly direction to the southern boundary of the State of Kansas near where the same is crossed by the Neosho River, thence through the Indian Territory to the State of Texas near the old town of Preston, now Denison, Texas; and that under said charter the line of said railway extending from Junction City, near Fort Riley, via Parsons, Kansas, to the southern line of Kansas, was built prior to June 1st, 1870; and that on February 3rd, 1870, the name of said railway company was, pursuant to authority conferred upon it by the laws of Kansas, changed to the Missouri, Kansas & Texas Railway Company.

Further complaining your oratrix says that on March 3, 1863, the Congress of the United States passed an act entitled: "*An act for the grant of lands to the State of Kansas in alternate sections to aid in the construction of certain railroads and telegraphs in said State.*" Among the railroads for whose benefit aid was granted by said act was a line of railway extending from the city of Atchison, via Topeka, the capital of the State, to the western line of the State in the direction of Fort Union and Santa Fe, New Mexico, with a branch from where said road crosses the Neosho (being at the present city of Emporia in Lyon County, Kansas), down the Neosho valley to a point where a railroad, also aided by said act, extending from the city of Leavenworth via the town of Lawrence to the south line of the State in the direction of Galveston Bay, in Texas, enters the Neosho Valley. The said branch of railway down the

Neosho valley was the same route covered by the charter of Union Pacific Railway Company, Southern Branch. The act of Congress of March 3, 1863, among other things provided, in section 3 thereof, that the railroads and branches, for whose benefit lands were thereby granted, should be and remain public highways for the use of the government of the United States, free from all toll or other charge, for the transportation of the property and troops of the United States; and by section 5 thereof that the United States mail should be transported over said roads and branches under the direction of the Post Office Department at such price as Congress might by law direct, and that until such price should be fixed by law, the Postmaster General should have power to determine the same. The said Act of Congress did not specify the railway companies which should have the benefit of the lands thereby granted.

Further complaining your oratrix states that on February 9th, 1864, the legislature of the State of Kansas, by an act entitled: "*An act to accept grant of lands made to the State of Kansas by the Congress of the United States to aid in the construction of certain railroads and telegraphs in said State, and to apply the same to the construction of said roads and telegraphs,*" duly accepted the grant of lands made by said act of Congress of March 3, 1863, upon the terms and conditions therein set forth. By section 3 of said act of the legislature of Kansas, of February 9, 1864, the State of Kansas agreed to grant, bargain and sell to the Atchison, Topeka & Santa Fe Railroad Company, a corporation organized and existing under the laws of Kansas by special act of the legislature of the Territory of Kansas, of February 11, 1859, all that portion of

the lands granted to the State by the act of Congress of March 3, 1863, for the said railroad hereinbefore described running from Atchison via Topeka to the west line of the State, with a branch down the Neosho valley, in consideration that said railroad company should build said lines of railway; and such agreement was made by said State of Kansas with said railroad company, upon the terms that such lands should be subject to the conditions, reservations and provisions set forth and contained in said act of Congress of March 3, 1863, and upon the further condition that the Congress of the United States should, on or before the 4th day of March, 1866, consent that the Neosho Valley Branch of the railroad might be extended so as to intersect the Union Pacific Railway, Eastern Division, at or near Fort Riley, now Junction City, and should make a grant of land for such extension of like amount per mile with that granted for the construction of the principal road, and that the said Atchison, Topeka & Santa Fe Railroad Company should proceed to construct such branch to such intersection, on the conditions provided in said act of the legislature of Kansas. Said act of the legislature of Kansas also provided that said company should file its acceptance of said act within six months after the passage thereof. The Atchison, Topeka & Santa Fe Railroad Company, within the time prescribed, duly accepted said act, and built its railroad across the State of Kansas, from east to west, but did not build the said Neosho Valley Branch, which, however, was subsequently built by the Union Pacific Railway Company, Southern Branch, afterwards named the Missouri, Kansas & Texas Railway Company, as will be hereinafter more fully shown.

Further complaining your oratrix states that on July 1, 1864, the Congress of the United States passed an act entitled: "*An act making an additional grant of lands to the State of Kansas to aid in the construction of railway and telegraph lines,*" whereby it granted to the State of Kansas to aid in the construction of the railway and telegraph line from Emporia via Council Grove to a point near Fort Riley, now Junction City, on the Union Pacific Railway, certain lands subject to all the provisions, restrictions, limitations and conditions of the said act of Congress of March 3, 1863, and provided further that said railway should be a public highway, and should transport troops and munitions of war of the United States free of charge.

Further complaining your oratrix states that on the 19th of March, 1866, the said Atchison, Topeka & Santa Fe Railroad Company, and the said Union Pacific Railway Company, Southern Branch, entered into a certain agreement in writing, whereby the Atchison Company assigned all of its rights in and to the lands granted by said acts of Congress of March 3, 1863, and July 1, 1864, as to the line of railroad from Fort Riley down the Neosho valley, and known as the Neosho Valley Branch, to the said Union Pacific Railway Company, Southern Branch, in consideration of the said Union Pacific Railway Company, Southern Branch, building the line of railroad from Fort Riley down the Neosho Valley.

Further complaining your oratrix states that on February 26, 1867, the legislature of the State of Kansas by joint resolution, duly approved by the governor, fully ratified and confirmed said assignment of the Atchison, Topeka & Santa Fe Railroad Company to the Union Pacific Railway Company, Southern Branch, as the

said State had the lawful power and right to do, and which assignment has always been respected by said companies and said State of Kansas, and fully recognized by the officers of the United States in adjusting the land grants of said companies, and has been repeatedly confirmed as legal and binding by the decisions of this and other courts.

Further complaining your orator states that on July 25, 1866, the Congress of the United States passed the following act:

"*An act granting lands to the State of Kansas to aid in the construction of the Kansas and Neosho Valley Railroad and its extension to Red River.*

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of aiding the Kansas and Neosho Valley Railroad Company, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from the eastern terminus of the Union Pacific Railroad, Eastern Division, at the line between Kansas and Missouri, at or near the mouth of the Kansas River, on the south side thereof, southwardly, through the eastern tier of counties in Kansas, with a view of its extension, so as to effect a junction at Red River with a railroad now being constructed from Galveston to Red River at or near Preston, in Texas, there is hereby granted to the State of Kansas, for the use and benefit of said Railroad Company, every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of said road, to be selected within twenty miles from (of) the line of said road; but in case it shall appear that the United States have,

when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said Company by the said Secretary for the purpose of the construction and operation of said railroad, as provided by this act: Provided, That any and all lands heretofore reserved to the United States by any Act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way two hundred feet in width is hereby granted, subject to the approval of the President of the United States: And provided, further, That none of the lands hereby granted shall be selected beyond twenty miles from the said road.

"Sec. 2. And be it further enacted, That the sections and parts of sections of land which by the aforesaid grant shall remain in the United States, within ten miles on each side of said road, shall not be sold for less than double the minimum price of public lands when sold, nor shall any of said lands become subject to sale at

private entry until the same shall have been first offered at public sale to the highest bidder, at or above the minimum price aforesaid: Provided, That actual bona fide settlers under the pre-emption laws of the United States may, after due proof of settlement, improvement, and occupation, as now provided by law, purchase the same at the price fixed for said lands at the date of such settlement, improvement, and occupation: And provided also, That settlers under the provisions of the Homestead act, who make their settlement after the passage of this act, and comply with the terms and requirements of said act, shall be entitled, within the said limits of ten miles, to patents for an amount not exceeding eighty acres each.

"Sec. 3. And be it further enacted, that the grant of lands hereby made is upon condition that said Company, after the construction of its road, shall keep it in repair and use and that (it will) at all times be in readiness to transport troops, munitions of war, supplies and public stores upon its road for the Government, when required to do so by any department thereof, at the cost, charge, and expense of said Company. And the lands hereby granted, held, and reserved as aforesaid shall inure to the benefit of said Company, as follows: When the Governor of the State of Kansas shall certify that any section of ten consecutive miles of said road is completed in a good, substantial, and workmanlike manner as a first-class railroad, then the said Secretary of the Interior shall issue to the said Company patents for so many sections of the lands within the limits above named as are co-terminous with said completed section hereinbefore granted; and when certificates of the Governor aforesaid shall be presented to said Secretary, of the completion, as aforesaid, of each successive section of ten consecutive miles of said road, the said Secretary shall in like manner issue to said Company patents for the land for each of said sections of road as in the first

instance, until said road shall be completed: Provided, That, if said road is not completed within ten years from the date of the acceptance of the grant hereinbefore made, the lands remaining unpatented shall revert to the United States: And provided further, That the said lands shall not, in any manner, be disposed of or incumbered by said company or its assigns, except as the same are patented under the provisions of this act.

"Sec. 4. And be it further enacted, That as soon as said Company shall file with the Secretary of the Interior maps of its line, designating the route thereof, it shall be the duty of the said Secretary to withdraw from the market the lands granted by this act, in such manner as may be best calculated to effect the purposes of this act and subserve the public interest.

"Sec. 5. And be it further enacted, That the United States mail shall be transported on said road and its extension, under the direction of the Post Office Department, at such price as Congress may by law provide: Provided, That until such price is fixed by law, the Postmaster General shall have power to fix the compensation.

"Sec. 6. And be it further enacted, That the right of way through the public lands be, and the same is hereby, granted to said Kansas and Neosho Valley Railroad Company, its successors and assigns, for the construction of a railroad as proposed; and the right is hereby given to said corporation to take from the public lands adjacent to the line of said road material for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said road, where it may pass through the public domain; also all necessary ground for station buildings, workshops, depots, machine shops, switches, side-tracks, turntables and water stations.

"Sec. 7. And be it further enacted, That the acceptance of the terms, conditions, and impositions of this act by the said Kansas and Neosho Valley Railroad Company shall be signified in writing, under the corporate seal of the said company, duly executed pursuant to the direction of its Board of Directors first had and obtained, which acceptance shall be made within one year after the passage of this act, and not afterwards, and shall be deposited with the Secretary of the Interior.

"Sec. 8. And be it further enacted, That said Kansas and Neosho Valley Railroad Company, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas south, through the Indian Territory, to Red River, at or near Preston, in the State of Texas, so as to connect with the railway now being constructed from Galveston to a point at or near Preston, in said State, and the right of way through the Indian Territory, wherever such right is now reserved or may hereafter be reserved to the United States by treaty with the Indian tribes, is hereby granted to said Company, to the same extent as granted by the sixth section of this act, through the public lands; and in all cases where the right of way, as aforesaid, through the Indian lands shall not be reserved to the Government, the said Company shall, before constructing its road, procure the consent of the tribe or tribes interested, which consent, with all its terms and conditions, shall be previously approved and endorsed by the President and filed with the Secretary of the Interior.

"Sec. 9. And be it further enacted, That the same grants of lands through the Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or

otherwise, not to exceed the ratio per mile granted in the first section of this act. Provided, That said lands become a part of the public lands of the United States.

"Sec. 10. And be it further enacted, That said Kansas and Neosho Valley Railroad Company, its successors and assigns, shall have the right to negotiate with, and acquire from any Indian Nation or Tribe, authorized by the United States to dispose of lands for railroad purposes, and from any other Nation or Tribe of Indians through whose lands said railroad may pass, subject to the approval of the President of the United States, or from any Company or parties incorporated or authorized for such purposes, by such Nation or Tribe, or which such parties may have acquired under the laws of the United States.

"Sec. 11. And be it further enacted, That any railroad company chartered under any law of the United States, or of the State of Kansas, which may have been heretofore or shall hereafter be recognized and subsidized by any act of the Congress of the United States, may connect, unite, and consolidate with this Railroad Company, after the same shall be located to the valley of the Neosho River, upon just, fair, and equitable terms, to be agreed upon between the parties, and shall not be against the public interest or the interest of the United States; nor shall any road authorized to connect as aforesaid charge the road so connecting a greater tariff per mile for freight or passengers than is charged for the same per mile by its own road: And provided further, That should the Leavenworth, Lawrence and Fort Gibson Railroad Company, or the Union Pacific Railroad Company, Southern Branch, construct and complete its road to that point on the southern boundary of the State of Kansas where the line of said Kansas

and Neosho Valley Railroad shall cross the same, before the said Kansas and Neosho Valley Railroad Company shall have constructed and completed its said road to said point, then and in that event the company so first reaching in completion the said point on the southern boundary of the State of Kansas shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas, with grants of land according to the provisions of this act, but upon the further special condition, nevertheless, that said railroad company shall have commenced in good faith the construction thereof before the said Kansas and Neosho Valley Railroad Company shall have completed its said railroad to said point: And provided further, That said other railroad company, so having commenced said work in good faith, shall continue to prosecute the same with sufficient energy to insure the completion of the same within a reasonable time, subject to the approval of the President of the United States: And provided further, That the right of way through private property, when not otherwise provided for in this act, or by the law of any State through which the road may pass, shall be obtained by said Kansas and Neosho Valley Railroad Company, or either of the other companies named in this act, in accordance with the provisions of section three of an act to amend an act entitled 'An Act to aid in the construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for Postal, Military and other purposes,' approved July first, eighteen hundred and sixty-two."

Further complaining your oratrix states that said act of Congress of July 25, 1866, was duly accepted by the State of Kansas and by the Missouri, Kansas & Texas Railway Company.

Further complaining your oratrix states that section 3 of said act of Congress of July 2, 1864, referred to in the 11th section of said act of Congress of July 25, 1866, and which said act of July 2, 1864, is entitled: "*An act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for Postal, Military and other purposes, approved July 1, 1862,'*" provides a comprehensive mode of procedure for the exercise of the power of eminent domain on the part of the railway company, and empowers the railway company to enter upon, purchase, take or hold any lands or premises that may be necessary and proper for the construction and working of its road, not exceeding in width one hundred feet on each side of its said line, unless a greater width be required for the purposes of excavation or embankment; and also any lands or premises that may be necessary for turnouts, standing places for cars, depots, station houses, or any other structure required in the construction and operation of its road.

Further complaining your oratrix states that on July 26, 1866, the Congress of the United States passed the following act:

"*An act granting Lands to the State of Kansas to aid in the Construction of a Southern Branch of the Union Pacific Railway and Telegraph, from Fort Riley, Kansas, to Fort Smith, Arkansas.*

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That for the purpose of aiding the Union Pacific Railroad Company, Southern Branch, the same being a corporation organized under the laws of the

State of Kansas to construct and operate a railroad from Fort Riley, Kansas, or near said military reservation, thence down the valley of the Neosho River to the southern line of the State of Kansas, with a view to an extension of the same through a portion of the Indian Territory to Fort Smith, Arkansas, there is hereby granted to the State of Kansas, for the use and benefit of said Railroad Company every alternate section of land or parts thereof designated by odd numbers, to the extent of five alternate sections per mile on each side of said road, and not exceeding in all ten sections per mile; but, in case it shall appear that the United States have, when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said Company by the said Secretary, for the purpose of the construction and operation of said railroad, as provided by this Act: Provided, That any and all lands heretofore reserved to the United States by any Act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this Act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way, two hundred feet in width, is hereby granted, subject to the approval of

the President of the United States: And provided, further, That said lands hereby granted shall not be selected beyond twenty miles from the line of said road.

"Sec. 2. And be it further enacted, That the sections and parts of sections of land which by the aforesaid grant shall remain in the United States, within ten miles on each side of said road, shall not be sold for less than double the minimum price of public lands when sold: Provided, That actual bona fide settlers under the pre-emption laws of the United States may, after due proof of settlement, improvement, and occupation, as now provided by law, purchase the same at the price fixed for said lands at the date of such settlement, improvement, and occupation: Provided, also, That settlers under the provisions of the Homestead Act, who make their settlement after the passage of this Act and comply with the terms and requirements of said Act, shall be entitled, within the said limits of ten miles, to patents for an amount not exceeding eighty acres each.

"Sec. 3. And be it further enacted, That the grant of lands hereby made is upon condition that said Company, after the construction of its road, shall keep it in repair and use, and shall at all times transport troops, munitions of war, supplies, and public stores upon its road for the Government of the United States, free from all cost or charge therefor to the Government, when required to do so by any Department thereof. And the lands hereby granted shall inure to the benefit of said Company, as follows: When the Governor of the State of Kansas shall certify that any section of ten consecutive miles of said road is completed in a good, substantial, and workmanlike manner, as a first-class railroad, then the said Secretary of the Interior shall issue to the said Company patents for so many sections of the land herein granted within the limits above named, and co-terminous with said completed section hereinbefore granted; and when certificates of the

Governor aforesaid shall be presented to said Secrtary of the completion, as aforesaid, of each successive section of ten consecutive miles of said road, the said Secretary shall in like manner issue to said Company patents for the land for each of said sections of road as in the first instance, until said road shall be completed: Provided, That if said road is not completed within ten years from the date of the acceptance of the grant hereinbefore made, the lands remaining unpatented shall revert to the United States.

"Sec. 4. And be it further enacted, That as soon as said Company shall file with the Secretary of the Interior, maps of its line, designating the route thereof, it shall be the duty of said Secretary to withdraw from the market the lands granted by this Act, in such manner as may be best calculated to effect the purposes of this Act and subserve the public interest.

"Sec. 5. And be it further enacted, That the United States mail shall be transported on said road, and under the direction of the Post Office Department, at such price as Congress may by law provide: Provided, That until such price is fixed by law the Postmaster General shall have power to fix the compensation.

"Sec. 6. And be it further enacted, That the right of way through the public lands be, and the same is hereby, granted to said Pacific Railroad Company, Southern Branch, its successors and assigns, for the construction of a railroad as proposed; and the right is hereby given to said corporation to take from the public lands adjacent to the line of said road material for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said road where it may pass through the public domain; also all necessary ground for station buildings, workshops, depots, machine shops, switches, sidetracks, turntables and water stations.

"Sec. 7. And be it further enacted, That the acceptance of the terms, conditions and impositions of this Act by the said Pacific Railroad Company, Southern Branch, shall be signified in writing, under the corporate seal of the said Company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within one year after the passage of this Act, and not afterwards, and shall be deposited with the Secretary of the Interior.

"Sec. 8. And be it further enacted, That said Pacific Railroad Company, Southern Branch, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas, south through the Indian Territory, with the consent of the Indians, and not otherwise, along the valley of Grand and Arkansas Rivers, to Fort Smith, in the State of Arkansas; and the right of way through said Indian Territory is hereby granted to said Company, its successors and assigns, to the extent of one hundred feet on each side of said road or roads, and all necessary ground for stations, buildings, work-shops, machine shops, switches, side tracks, turntables and water stations.

"Sec. 9. And be it further enacted, That the same grant(s) of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this Act: Provided, That said lands become a part of the public lands of the United States.

"Sec. 10. And be it further enacted, That said Pacific Railroad Company, Southern Branch, its successors and assigns, shall have the right to negotiate with, and acquire title to land for railroad purposes from, any Indian Nation or Tribe authorized by the United States to dispose of lands, and from any other Nation or Tribe of Indians through whose lands said railroad may pass,

subject to the approval of the United States, or from any company or parties incorporated or authorized for such purposes, by such Nation or Tribe, or which such parties may have acquired under the laws of the United States.

"Sec. 11. And be it further enacted, That any railroad company chartered under any law of the United States, or of any State which may have been heretofore or shall hereafter be organized by any act of Congress of the United States, may connect, unite, and consolidate with this railroad company, after the same shall be located to the valley of the Neosho or Grand River, upon just, fair, and equitable terms, to be agreed upon between the parties, as shall not be against the public interest, or the interest of the United States."

Your oratrix further shows that in the administration of the land grants made to the State of Kansas under the Acts of Congress of March 3, 1863, February 9, 1864, and of July 25th and 26th, 1866, and other acts, herein referred to, wherein the lands were granted to the State of Kansas for the benefit of railway companies, the grants of the lands in place were at all times held to be grants *in praesenti*, conveying the fee simple title as from the date thereof to the State of Kansas as trustee for the railway companies, and such construction of the said grants has been uniformly upheld by the courts of the United States whenever brought in question, and so your oratrix claims and avers that the grant of lands through the Indian Territory, including the Creek Nation, was a grant *in praesenti* of the fee simple title to said granted lands comprising the odd sections within the twenty mile limit on either side of the railroad as located and constructed, to the State of Kansas for the use and benefit of said Missouri, Kansas & Texas Railway Company.

Your oratrix further shows that the land grant acts of

Congress to aid in the construction of a railroad from the Missouri River to the Pacific Ocean of July 1, 1862, as amended by the act of July 2, 1864, and the grants to the State of Kansas by the acts of 1863 and 1864 and the acts of July 25th and 26th, 1866, herein referred to, were part of a general scheme and purpose to provide for the construction of the Union Pacific Railroad System and of a railroad down the Neosho Valley and thence through the Indian Territory connecting with other railroads in Texas extending to the Gulf of Mexico and the Republic of Mexico; and that the land grant acts of March 3, 1863, and February 9, 1864, so far as they related to the line down the Neosho Valley, and the act of July 26, 1866, and of July 25, 1866, so far as they related to the railroad across the Indian Territory, were all intended for the benefit of the Union Pacific Railway Company Southern Branch, afterwards named the Missouri, Kansas & Texas Railway Company; and that said land grants were administered by the Land Department of the United States, and the great purpose of these land grant acts was not only the development of the country, by providing for it railroad facilities, but to secure for the Government of the United States means for the transmission of its mails, troops and munitions of war across the continent and from Fort Riley through Kansas and the Indian Territory to Texas, and thence through Texas to the Gulf of Mexico and the Republic of Mexico, the Government to receive its transportation over the parts of the railroads to which the grants were given free of cost.

Further complaining your oratrix states that under treaties of the United States of America and the Cherokee, Creek and Choctaw and Chickasaw Nations of Indians, concluded respectively July 19, 1866, June 14, 1866, and April 28, 1866, these Nations, and each of them, granted a right of way to any railroad company



which should be authorized by Congress to construct a railroad from any point north to any point south through said Nations, as well as other valuable rights and privileges, and a copy of said treaty with the Creek Nation is attached to the Bill of Complaint, marked Exhibit "A," and made part hereof.

Further complaining your oratrix states that said Missouri, Kansas and Texas Railway Company built its line of railroad to the southern boundary of the State of Kanass under said acts of Congress of March 3, 1863, July 1, 1864, and July 25 and 26, 1866, first, and thereby earned the lands granted to it in the State of Kansas by said acts, but owing to previous grants and reservations of the lands in place and indemnity limits within said grants, it only received a part of the full quota of such grants, there being, as finally ascertained by the Land Department of the United States, a deficiency in said land grants in the State of Kansas of 388,338 acres.

By an act of the legislature of the State of Texas passed August 2, 1870, entitled: —

"*An act in relation to the Missouri, Kansas & Texas Railway Company, late Union Pacific Railway Company, Southern Branch,*" the said Missouri, Kansas & Texas Railway Company, which was in said act recited to be a corporation authorized by Congress to construct a railway into the Indian Territory, was granted the right to extend its railroad, together with its telegraph lines, from some convenient point on Red river between Preston (now Denison) and Doaksville where its road should cross from the Indian Territory, in the State of Texas, into and through the State of Texas in the general direction of Waco and Austin to the Rio Grande, with a view of extending the same to Camargo and the city of Mexico, in the Republic of Mexico, with the

right to build branch lines and acquire the railroads of connecting companies, and by said act the said railway company, in constructing and operating its railroad and branches, was authorized to have and exercise all the rights, powers, privileges and immunities granted by its acts of incorporation and amendments thereto so far as the same should be applicable to the State of Texas, and not inconsistent with the constitution thereof; together with all the rights, powers, privileges, benefits and immunities conferred by all general laws then existing or that thereafter should be passed by the legislature of Texas in relation to railroad corporations in the same manner and to the same extent as if incorporated by that State.

On March 2d, 1871, the legislature of the State of Kansas passed an act entitled: —

"*An act in relation to the Missouri, Kansas & Texas Railway Company, late Union Pacific Railway Company, Southern Branch,*" in words and figures as follows, to wit: —

"That whereas the said Missouri, Kansas & Texas Railway Company has heretofore, in accordance with the laws of this State, united and consolidated with, and merged into itself, all the rights, powers, privileges and property of the Labette and Sedalia Railway Company, and of the Neosho Valley and Holden Railway Company, and has also, in accordance with law, purchased and merged into itself all of the powers, privileges, franchises and property of the Tebo and Neosho Railway Company, a corporation organized under the laws of Missouri, except such as appertain to an extension of the line of road of that company north from Sedalia, in said State of Missouri, and whereas the said company has acquired and become vested with certain rights, privileges, franchises and property in the Indian Territory, under certain acts of the Congress of the United States

with the right to extend and operate its road into and through that Territory; and whereas the said company has acquired and become vested with certain rights, privileges, franchises and property in the State of Texas, under an act or acts of the legislature of said State, including the right of extending and operating its road into and through the State of Texas; and whereas it is for the interest of the said company, as well as of the public generally, that in constructing and operating its road, branches and extensions as aforesaid, that so far as is practicable, the said company shall have, exercise and enjoy a uniformity of powers over its whole line of road; therefore it is hereby enacted that the said Missouri, Kansas & Texas Railway Company, in constructing, extending and operating its road, shall have, possess and enjoy, and is hereby vested with the same rights, privileges, powers and immunities over its whole line that it now has and enjoys over any part or portion thereof, by virtue of any laws of Kansas, including the right to increase its capital stock.

Further complaining your oratrix states that on May 21, 1870, the Secretary of the Interior found and reported to the President of the United States that the Kansas & Neosho Railroad Company was not authorized to enter the Indian Territory and build the trunk line provided for in said act of Congress of July 25, 1866, and said Indian Treaties, but that the line of railway of the said Union Pacific Railway Company, Southern Branch, since renamed Missouri, Kansas & Texas Railway Company was in substantial accord with the scheme fixed by the act of Congress and treaties aforesaid, and recommended the appointment of a commission to determine which of the said railroad companies should first fully comply with the conditions of the statutes, and to report to the Department when such complete fulfillment shall have taken place, and a commission was appointed accordingly and its report and the finding of the Secretary of the Interior were approved by the President of the United States, U. S.

Grant, May 23, 1870, and the recommendations of the Secretary of the Interior directed to be carried out, and which said report and findings of the Secretary of the Interior, and the approval and directions of the President, were in words and figures as follows:

"Department of the Interior,
"Washington, D. C., May 21, 1870.

"Sir: On the 13th instant, upon a complaint filed in this department by the duly authorized delegates of the Cherokee Nation, averring that parties alleging themselves to be working parties of the Southern Branch Union Pacific Railway Company, had entered the Cherokee country, and were employed in grading a line for a railway, the officers of said railway company were notified by this department that the Cherokee Indians did not recognize their right to intrude upon their territory, and that no work of the kind referred to could be permitted therein until the Executive should be satisfied by evidence submitted through this department that such entry and occupation was in accordance with law. A similar notice had been given on the 27th ultimo to the officers of the Kansas and Neosho Valley Railway Company, who were reported to have entered the Quapaw reservation, near the town of Baxter, in southeastern Kansas.

"On Wednesday, the 18th instant, the said Southern Branch Union Pacific Railway Company appeared by their counsel, and moved for the revocation of said notification and order with respect to them, and the Cherokees, the Creeks, the Kansas and Neosho Valley Railroad Company, the Leavenworth, Lawrence and Fort Gibson Railroad Company, and the Atlantic and Pacific Railroad Company, appeared by Counsel to represent their several interests in the questions involved.

"The point submitted for the consideration of the department and for your determination is, what rights have been given to railroad companies to construct rail-

roads through the Indian Territory, and what railroads, if any, are entitled to such privileges and right of way?

"In the year 1866 a series of treaties were negotiated with the Cherokees, the Creeks, the Choctaws, the Chickasaws, and the Seminole Indians, in which stipulations were made permitting railroads to be constructed in the Indian Territory. At the same time laws were enacted by Congress authorizing the several railroad companies named, under certain conditions, to approach the boundary of the Indian country on the north or on the east, with a view to the construction of, at least, one railway from north to the south through the Indian Territory, from Kansas to Eastern Texas, and at least one railway through the Indian Territory, from east to west, from Missouri or Arkansas, to northern Texas.

"On the part of the Indians it is claimed that the whole scheme of treaties and of legislation looked to the construction of but a single trunk road through the Territory from north to south, and, so far as the Cherokee Nation is concerned, for the like construction of but a single road through its territory, from east to west.

"On the part of the Kansas & Neosho Valley road, the Leavenworth, Lawrence and Fort Gibson road, and the Atlantic and Pacific road, the interpretation given by the Indians to the treaties and laws was admitted to be the correct one. The Southern Branch Union Pacific Company denied that interpretation, and insisted that the meaning of the legislation and of the treaties was to give the right of way to as many roads as might in any manner be authorized by Congress to enter the Territory. It was admitted by all parties that the Acts of Congress of July 25, 26 and 27, 1866, granting lands and privileges to the Kansas and Neosho road, the Southern Branch Union Pacific road and the Atlantic and Pacific road, respectively, and the several Indian treaties referred to, were all essentially parts of the same transaction, and were to be taken and construed together for the purpose of determinng the scheme which was intended to be legalized by Congress.

"The Act granting lands for the Kansas and Neosho

Valley road declared that it was to aid said company 'to construct and operate a railroad from the eastern terminus of the Union Pacific Railroad, Eastern Division, at the line between Kansas and Missouri, at or near the mouth of the Kansas River, on the south side thereof, southwardly, through the eastern tier of counties in Kansas, with a view of its extension, so as to effect a junction at Red River with a railroad now being constructed from Galveston to Red River, at or near Preston, in Texas.' Section eight of that Act authorized said company 'to extend and construct its railroad from the southern boundary of Kansas south, through the Indian Territory, to Red River, at or near Preston, in the State of Texas,' and gave 'the right of way through the Indian Territory, wherever such right is now reserved, or may hereafter be reserved to the United States by treaty with the Indian tribes,' and wherever such right of way should not be reserved, the consent of the Indian tribes interested was declared to be necessary, which consent, with all its terms and conditions, should be previously approved and endorsed by the President and filed with the Secretary of the Interior. The eleventh section of the Act provided that, after this railroad, shall be located to the valley of the Neosho River, any other railroad company, duly chartered, might connect, unite and consolidate with it upon equitable terms, and that, 'should the Leavenworth, Lawrence and Fort Gibson Railroad Company, or the Union Pacific Railroad Company, Southern Branch, construct and complete its road to that point on the southern boundary of the State of Kansas where the line of said Kansas and Neosho Valley Railroad shall cross the same, before the said Kansas and Neosho Valley Railroad Company shall have constructed and completed its said road to said point, then, and in that event the company so first reaching in completion the said point on the southern boundary of the State of Kansas shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of rail-

road from said point to a point at or near Preston, in the State of Texas." This Act was approved July 25, 1866.

"On the next day the act was approved giving aid to the Union Pacific Railway Company, Southern Branch, which provided for aiding that Company 'to construct and operate a railroad from Fort Riley, Kansas, down the valley of the Neosho River, to the southern line of the State of Kansas, with a view to the extension of the same through a portion of the Indian Territory to Fort Smith, Arkansas.'

"Section eight of that Act declared that said Company was 'authorized and empowered to extend and construct its railroad from the southern boundary of Kansas, south through the Indian Territory, with the consent of the Indians, and not otherwise, along the valley of Grand and Arkansas Rivers to Fort Smith, in the State of Arkansas,' and the right of way through said Indian Territory to the extent of one hundred feet on each side of the road purported to be granted by said section. Section eleven further provided, that after said road should be located to the valley of the Neosho and Grand Rivers, other duly chartered roads might consolidate with it in a similar manner to that provided in section eleven of the Act giving aid to the Kansas and Neosho Valley road.

"It was claimed on behalf of the Southern Branch, Union Pacific road, first that the act just referred to was complete in its terms, and did not recognize any community of interest in any part of its line with any other road; and, secondly, that the consent of the Indians required by said Act, was given in the Cherokee Treaty of 1866. In admitting, however, as was distinctly done, that the several acts and treaties were to be taken and construed together, I am of the opinion that the interpretation sought to be given by this company to its own charter, and to the treaties is practically aban doned. Its authorized route is down the valley of the Neosho and Grand Rivers. The Grand River is formed by the junction of the Neosho with a smaller stream

called Spring River, and the Neosho crosses the southern line of the State of Kansas, and enters the Indian Territory before uniting with Spring River.

"In like manner the Kansas and Neosho Valley road has its route indicated, not only by its name, but in section eleven of its act, which has already been quoted. Its consolidation with other companies is permitted after it shall have located its line 'to the valley of the Neosho River.' The same section distinctly declares that these roads shall have a common point at the southern line of the State of Kansas.

"It is hence demonstrated that both roads must be in the valley of the Neosho River, where it crosses the southern boundary of Kansas, in order to fullfil the terms of the acts under which alone they have the power to enter the Indian Territory, or obtain any right of way through the same. For that common point in the common boundary between Kansas and the Indian Territory, the three roads named were to run a race, and the one first reaching that point was to have the right of way southward through the Indian Territory, to Preston, in the Sate of Texas. Whatever latent ambiguity, therefore, there might be in the act authorizing the Southern Branch, Union Pacific Railroad to enter the Indian Territory, seems to me to be thus perfectly explained when the terms of the two acts are carefully compared. This view of the case is decisively sustained by the debates in Congress on the passage of both acts.

"On the 13th of June, 1866, in the debate in the Senate on the Kansas and Neosho bill, Senator Hendricks, who appeared to champion the interests of the Leavenworth, Lawrence and Fort Gibson road, declared that the proposition was to start a railroad 'opposite to Kansas City, in Missouri, and to run down until it shall intersect the road to which we made a grant three years ago, and whichever road can get to the southern boundary of the State of Kansas first is to have the right to run through the Indian Territory. That is the proposition.' To this Senator Pomeroy, who, in like manner appeared to advocate the interests of the Kansas and Neosho road, re-

sponded that 'the proposition was a fair one.' Mr. Hendricks still objected that prior rights granted to the earlier incorporated road would be thus improperly interfered with.

"On the 20th of June, the debate was again renewed. Mr. Hendricks said:

> 'The eleventh section proposes to make a contest between three companies for the right of way through the Indian country and the right to build a railroad through the Indian country. This bill proposes that these three roads shall meet at the southern boundary of Kansas, and then it shall be a race of speed for the right to construct the trunk road from that point through the Indian country to the northern boundary of Texas.'

"This was again assented to, by all of the senators taking part in the debate, as being the true meaning and intent of the bill.

"On the 22nd of June, the same bill again under discussion, Mr. Henderson, chairman of the committee having the same in charge, said:

> 'In order that the Senate may understand what the proposition is, I will state that this section (the eleventh) provides, inasmuch as there are several roads running down to the southern borders of Kansas, that whichever road gets to the southern limits of Kansas first shall take the grant, and go on to the Gulf of Mexico. That is all that this section does. Instead of leaving it open for various competing lines hereafter to ask for several roads through the Indian country, it provides that whatever company completes its road down to the southern borders of Kansas first shall take the grant and build the road to the Gulf, and that there shall be but one road built in that direction.'

"Mr. Pomeroy said:

'In addition to what the Senator from Missouri has said, I desire to say this: The grant beyond the southern line of Kansas is simply the grant of the right of way with the consent of the Indians. It is not a grant of land, but a right of way with the consent of the Indian tribes, and all the tribes have made treaties consenting to it except one.'

"By referring to the date at which the several treaties referred to were executed, it will be seen that the treaty with the Choctaws and Chickasaws was concluded on the 26th of April, 1866; that with the Creeks was concluded on the 14th day of June, 1866; but that with the Cherokees was not concluded until the 19th day of July in the same year. It is therefore clear that the treaty with the Cherokees was that referred to by Mr. Pomeroy in the quotation above given and that it was the distinctly stated meaning of the act that these roads were to run through the lands of the Indian tribes whose treaties thus made a complete right of way for a trunk road from Kansas to Texas. If anything more were needed to prove that the common point of meeting at the northern boundary of the Indian Territory was fixed in the valley of the Neosho River where that river crosses the southeastern line, the evidence thus adduced would be conclusive. East of the Neosho River, and bounded upon it, in the northeast corner of the Indian Territory, are several small Indian reservations of the Quapaws, Senecas and others. To reach the Cherokee country, and in order to have a complete and perfected right of way, it was necessary that the railroads should enter the Indian Territory at its crossing by the Neosho River, or on the westward side of that stream. That the Act granting aid to the Southern Branch, Union Pacific Railroad Company, did not conflict with this interpretation is clear, not only from the comparison made of the language of the statutes themselves in the light of the debates already referred to, but when the last named bill was itself before the Senate, on the third day of June, the debate shows that the opposition which had

been, to a certain extent, made by Mr. Hendricks on the part of the Leavenworth, Lawrence and Fort Gibson Railroad Company, to the general scheme had been abandoned.

"In that debate he spoke as follows: —

'I will state to the Senator from Michigan that I thought two weeks ago that we ought to confine the grant to Galveston Bay, or rather to the northern boundary of Texas, to the road to which we made the grant three years ago, but the Senate did not concur in that view, and this is part of the policy agreed upon two weeks ago by the Senate.

'Mr. Grimes: There is one question I should like the Senator from Indiana to answer.

'Mr. Hendricks: I am not going to answer many questions.

'Mr. Grimes: I should like to know whether the Senator has investigated this subject sufficiently, so as to satisfy himself that if we pass this bill we will not mar the symmetry and beauty of that zebra-marked map which he exhibited to the Senate the other day, showing these additional railroad lines?

'Mr. Hendricks: No, sir.

'Mr. Grimes: If so, I am satisfied with the bill.

'Mr. Hendricks: I will state to the Senator that from a point about seventy miles south of the southern boundary of Kansas, it will start a new system of marks in a southeastern direction to Fort Smith, and with that addition, it will leave the maps as they are already marked.'

"By an examination of the map it appears that Fort Gibson, the original point of termination of the Leavenworth, Lawrence and Fort Gibson road, is at the mouth of the Grand River, where it flows into the Arkansas, and is, therefore, at the southern end of that portion of the trunk road which passes through the Cherokee country, the country south of the Arkansas River belonging to the Creeks. The direction from Fort Gibson to Pres-

ton, in Texas, is southwest. To reach Fort Smith, the road must descend the valley of the Arkansas River to the southeast. It also appears by the section lines on the map, that the distance, in a straight line from Kansas line to Fort Gibson, is very little over the distance named by the Senator. We also find that in the ordinary official maps published shortly after the passage of these acts on which the officers of this department have marked the projected routes as nearly as they could then be ascertained from the representatives of the companies themselves, that the Neosho Valley at the point where the river crosses the southern boundary of Kansas, is laid down as the common point of junction for these roads, and Fort Gibson as the point at which the road to Preston diverges from the road to Fort Smith. Without reference, therefore, to the Indian treaties, I think it as clear as evidence can make it that the construction I have indicated as the scheme intended by Congress is that which is really contained in the laws. A glance at the treaties will only add strength to the conclusion by cumulative evidence.

"The general scheme which has been referred to, in providing for a trunk road running north and south through the Indian Territory from the Neosho Valley to Preston in Texas, implied necessarily that the road should traverse the country of the Cherokees, of the Creeks, of the Choctaws, and to some extent, at least, that of the Chickasaws. The road from east to west provided for a northern branch traversing the Cherokee country, and that of the Creeks; its southern branch, running up the Canadian, would traverse the country of the Choctaws, the Creeks and the Seminoles, with a possibility of entering the Chickasaw country.

"It will thus be seen from a glance at the map that through the Seminole country a single east and west road was the only one entering into the general plan, while through the Creek and Chickasaw country, as well as the Cherokee, a road in each direction was contemplated. If, then, we turn to the treaty with the Semin-

oles, which was the first of the series, we find it declared in article five:

> 'The Seminole nation hereby grant a right of way through their lands to any Company which shall be duly authorized by Congress, and shall, with the express consent and approbation of the Secretary of the Interior, undertake to construct a railroad from any point on their eastern to their western or southern boundary, but said railroad company, together with all its agents and employes, shall be subject to the laws of the United States, relating to the intercourse with Indian Tribes, and also to such rules and regulations as may be prescribed by the Secretary of the Interior for that purpose.'

"If the words 'any company' in the above quotation stood alone, there might be doubt as to whether more than one company was intended; but when, in a subsequent clause of the same paragraph, the words 'said railroad company' in the singular number are used, it becomes entirely clear that but one company was meant, and that the word 'any' meant only one company and not several companies. In article six of the treaty with the Choctaws and Chickasaws similar language is used, authorizing the construction of 'a railroad through the Choctaw and Chickasaw nation from the north to the south thereof, and from the east to the west side thereof;' and, subsequently, provides that 'such railroad company or companies, with all its or their agents and employes, shall be subject to the laws of the United States relating to intercourse with the Indian tribes; and also to such rules and regulations as may be prescribed by the Secretary of the Interior for that purpose.'

"If it had been intended that this treaty should provide for any number of companies traversing the country that Congress might direct, there could have been no reason for using the cardinal points of the compass in describing the route of a road from north to south, and

a road from east to west; but it would have been both more natural and more simple to have said merely that authority and right of way was granted to any railroad companies that might run through their territory under permission of acts of Congress, without specifying either number or direction. As the language stands, its most natural interpretation seems to me to be clearly in accord with what I have shown to be the general scheme provided by the Congressional acts.

"In the fifth article of the Creek Treaty while the language evidently has the same meaning as that which I have attributed to the Choctaw and Chickasaw treaty, it is more distinctly explicit. It declares:

> 'The Creek Nation hereby grant a right of way through their lands, to the Choctaw and Chickasaw country, to any company which shall be duly authorized by Congress, and shall, with the express consent and approbation of the Secretary of the Interior, undertake to construct a railroad from any point north of to any point in or south of the Creek country, and likewise from any point on their eastern to their western or southern boundary; but said railroad company, together with all its agents, and employes, shall be subject to the laws of the United States relating to intercourse with Indian tribes, and also to such rules and regulations as may be prescribed by the Secretary of the Interior, etc.'

"In this case the anxiety to avoid the appearance of consenting to more than one road in each direction has been evidently so great as to lead, if the words were taken alone, to a doubt in the other direction as to whether both roads were not intended to be under the control of a single corporation.

"When we come to the treaty with the Cherokees, which was the last of the series, and the one which has been mentioned in the quotation from the Senate debate which I have given, and was the one which completed the

scheme of railroad communication through the Territory, its eleventh article, we find, provides for the similar grant of right of way, 'to any company or corporation which shall be duly authorized by Congress to construct a railroad from any point north to any point south, and from any point east to any point west, of and which may pass through the Cherokee nation.'

"The language here being almost identical with that used in the two preceding treaties, is so manifestly intended to indicate part of one system, that even without the light thrown upon it by the debate in Congress, and by the terms of the several statutes pertaining to the railroad companies, it would seem to me to be clear that the interpretation insisted upon by the Cherokee delegation is the true one, and that it was the intention to provide for but a single road from north to south, and a single road from east to west through the Cherokee country. We have, however, before us the further statement of Senator Harlan, who was the Secretary of the Interior at the time this treaty was made; of Messrs. William A. Phillips and J. W. Wright, whose names are appended to it as witnesses, that the interpretation I have given was in fact the one, and the only one, intended and declared at the time the treaty was made. Whether, therefore, we look to the language of the treaty and the statutes taken together, without the aid of extraneous testimony, or seek in the congressional debates, in the statements of those who were parties to the transaction, or witnesses thereto, to discover what was in reality intended between the United States and those Indians under its protection, we are brought to the same conclusion by a course of reasoning which seems to me entirely irrefragable.

"The only other point I deem it necessary to refer to in seeking the meaning of the statutes and the treaties, is in regard to the consent of the Indians, in accordance with which, and not otherwise, the Southern Branch Union Pacific road was authorized to extend its line to Fort Smith. I think that it is here equally clear, upon

a comparison of the statutes, that it was intended that in so far as the line of this road should necessarily depart from the main trunk, running through the Neosho Valley to Preston, in Texas, it should do so only upon obtaining the consent of the Indian tribes through whose lands such diverging part of the road might go. As has been already remarked, it was distinctly declared in the Senate without contradiction, that such divergence would commence at a point somewhere about seventy miles south of the Kansas boundary-line, and it is entirely clear that it was supposed that Fort Gibson was the point referred to. I accordingly find such to be the proper meaning and intent of the statutes in that regard.

"The only question which now remains to be determined is, whether either, and if so, which, of the railroad companies engaged in the race from points in Kansas for the northern boundary of the Indian Territory, has performed the conditions necessary to acquire the right to construct the trunk road north and south through the Indian Territory.

"I find that Mr. Joy, one of the principal stockholders and directors of the Kansas and Neosho Valley Railroad Company, in the year following the passage of the acts and the ratification of the treaties which have been mentioned, procured the possession, by purchase, of the tract of land in southeastern Kansas, immediately north of the boundary of the Indian Territory, known as 'the Cherokee neutral lands,' and that soon after this purchase the line of said railway company was located due north and south through the greater part of said Cherokee lands, and nearly, if not exactly, upon the line dividing the land so purchased into two equal eastern and western parts; that the construction of the road upon this line, which I believe to have been made for the purpose of giving, as nearly as possible, equally increased values to the lands so purchased, in all their parts, has taken this road off the line necessary to intersect the Indian boundary-line, at the Neosho river or near the same,' and that the road has, in fact, been constructed to a point

on the Indian boundary-line about ten or more miles east of said Neosho River, touching the reservation of the Quapaws, through which no power to pass has been granted by treaty or by consent of the Indians holding that and several other small reservations in the northeastern corner of the Territory. I find, further, that the point where said Kansas and Neosho Railroad Company has touched the southern boundary of Kansas and the northern boundary of the Indian Territory, is not one reasonably within the meaning and purpose of the general scheme which I have found to have been fixed by the legislation and treaties referred to. In addition to these considerations, I would submit that it would be manifestly unfair and inequitable if one company were allowed, at its own will, to change the plan of route so as to shorten its own line to the common point, and lengthen that of its competitors by a distance which might be twenty-five miles, or equal to that, from the Neosho River to the Missouri boundary-line. I therefore find that the Kansas and Neosho Railroad Company is not authorized at present, under said legislation, to enter the Indian Territory and build the trunk line aforesaid, and that to complete its right at this time to do so, it would have been necessary for the said road to have been completely constructed to a point in the Neosho Valley at or near the crossing of the boundary line by the Neosho, and where it could enter the Cherokee country without crossing the reservation of any other Indian tribe. This the said Company has not done.

"As to the Southern Branch Union Pacific Railroad Company, I find that its line of road is in substantial accord with the scheme fixed by the legislation and treaties, but that said Company has not built a completed line of railroad up to this date to the crossing of the Indian boundary-line. I find further that the said Railroad Company, without completing its said road to the aforesaid common point of crossing the Indian boundary, has gone on in advance to grade within the Indian Territory, and is, therefore, an intruder within said

Territory, and that the complaint of the Cherokee Nation in regard to them is well founded.

"As to the Leavenworth, Lawrence and Fort Gibson road, it is not averred on its behalf that it is now in a condition to claim the right of entry to the Indian Territory.

"As to the Atlantic and Pacific Company approaching the Indian Territory upon the east, I do not find that its claim to cross the Cherokee country is disputed by any other corporation authorized to build a road in that direction; but not having had fully before me the facts requisite to determine whether said company has fulfilled all the conditions precedent to entering the Territory, and it being admitted that its road has not yet reached the neighborhood of the eastern boundary-line of the Territory, it is not necessary now to pass finally upon its rights.

"If you shall agree with me in the conclusions I have reached, it is apparent that, inasmuch as it may soon be necessary to decide which company shall first completely fulfill the conditions upon which its right to enter the Territory may depend, some means should be taken to have such determination made in a manner calculated to avoid disputes between any of the parties in interest and the Indians, and to avoid breaches of the peace which might arise out of such disputes.

"I would, therefore, respectfully recommend that the Superintendent for the Central Indian Superintendency, and the military officer acting as the superintendent for the Southern Indian Superintendency, be appointed by you, a commission, to determine which of the said railroad companies shall first fully comply with the conditions of the statutes as the same have been hereinbefore defined and to report to this department when such complete fulfillment shall have taken place; that an executive order be issud declaring that no railroad Company shall be permitted to enter said Indian Territory for the purpose of grading or constructing a

railroad until such report shall have been received and approved by yourself, and a formal permission given.

"There is incidentally connected with the discussion of these questions the further one as to the propriety of giving approval to the construction of other railroads through the Indian country than those which may be built in strict accordance with the scheme fixed by the treaties and by legislation.

"The policy of preserving the Indian Territory as free as possible from intrusion by white settlers, under any form, has been hitherto regarded as firmly established in this country. It has been based upon the well-known fact that the Indian tribes which are brought into closest contact with the whites have been uniformly injured by drunkenness, and other vices, which they have seemed peculiarly unable to resist, and the only hope of their complete civilization seems, by common consent, to rest upon our ability to keep them by themselves, under stringent laws with regard to the introduction of intoxicating liquors, and in circumstances where immoral intercourse with the whites shall be prevented as thoroughly as possible.

"The intelligent men among the civilized Indians fully appreciate the necessity of this policy, and their delegations have been extremely earnest in deprecating any course which may throw them into closer contact or more direct competition with our own people than is absolutely necessary. Negotiations for the removal of Indians from the small reservations in Kansas and Nebraska to the Indian Territory have been based upon this policy, and in order to carry it out with any degree of success it is necessary to adhere to it as firmly as possible.

"We cannot honestly advise the scattered and small tribes now within our organized States, to migrate to the Indian country, except upon the honest assurance that there, with the advantages of teachers and mission establishments, and protected from the temptations which have heretofore been so ruinous to them, they

may work out the problem of their possible civilization and final incorporation into the nation.

"I, therefore, most earnestly advise, inasmuch as in the wisdom of Congress the scheme involving the building of but one trunk railroad through the Territory from north to south, with a branch from Fort Gibson to Fort Smith, and a double line from east to west, meeting in the valley of the Canadian, has been deemed sufficient for the necessities of our own commercial intercourse between different sections of the country, that this scheme be rigidly adhered to, and that no approval be given to any deviation therefrom.

"I am, sir, with great respect, your obedient servant, J. D. Cox, Secretary.

"The President.

Executive Mansion, May 23, 1870.

"The views and findings of the Secretary of the Interior herein are approved, and his recommendations will be carried into execution. U. S. Grant."

Further complaining your oratrix states that on the 12th day of July, 1870, the Secretary of the Interior submitted his additional findings and report to the President, incorporating therein the report of the said Commission, dated June 13, 1870, which had been appointed to determine which railroad Company first reached the northern boundary of the Indian Territory, and became entitled to build through the Indian Territory, and acquired the right of way and lands granted in said acts of Congress; and which said additional findings were approved by the President of the United States, U. S. Grant, on July 20, 1870, and the said additional findings and report of the Secretary of the Interior, and the approval of the President, as aforesaid, were in words and figures as follows:

"DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., July 12, 1870.

" *To the President:*

SIR:—On the 21st of May, last, I laid before you a communication with regard to railroads in the Indian Territory, in which I reported that I found under the legislation of 1866 and the treaties with the Cherokee, Creek, Choctaw and Chickasaw and Seminole Indians of the same year that three railroads in the State of Kansas were authorized to build their lines to a common point on the northern boundary of the Cherokee lands in the Indian Territory, near where the Neosho River crosses said boundary, and that the road which should succeed in first reaching said common point should be authorized to build a trunk road through the Indian Territory to a point at or near Preston, in the State of Texas, and that but one such trunk, from north to south, was authorized to be built. I recommended that, if you should agree with me in the conclusion I reached, the Superintendent for the Central and Southern Indian Superintendencies be appointed a commission to determine which of the said railroad companies should first fully comply with the conditions of the statutes as the same were defined, and to report to this Department when such complete fulfillment should have taken place. The views and findings which I laid before you were approved by you on the 23d of May, and you directed that my recommendations, including those above referred to, should be carried into execution. I have now the honor to state that I have received a report from said Commissioners, dated the 13th day of June, 1870, showing:

"1st. That the Union Pacific Railway, Southern Branch, reached the northern boundary of the Indian Territory, in the valley of the Neosho River, on the west side and about one mile therefrom, at 12 M. on the 6th day of June, 1870, and that at that time there was no other railroad nearer than sixteen miles of that point.

"2nd. That on the 9th day of June, 1870, Governor James M. Harvey, of the State of Kansas, the officer specified by Act of Congress to pronounce upon the completion of this railroad, certified over his official seal and signature that the same was a first class completed railroad to the northern boundary of the Indian Territory.

"Under a misapprehension as to the condition of the controversy between the several roads before yourself and this Department, the said Commissioners proceeded further to make some statements with regard to the Kansas and Neosho Valley Railroad, which reached the northern boundary of the Indian Territory on the 30th day of April, 1870, but at a point about fifteen miles east of the Neosho River, and upon the borders of the Quapaw reservation, through which no right for any railroad company to enter has been granted by the Indians, as I have formerly reported to you in my communication of the 21st of May, above mentioned.

"I transmit herewith a complete copy of said Commissioners' report, for your information, and state that, while their views expressed upon the matters not submitted to them, and the documents forwarded by them, have had full weight, so far as they properly might, in the consideration of questions arising before me, I have regarded their official determination as embodied in the two paragraphs which I have quoted above, ending at that portion of their letter commencing with the statement that 'by a strict adherence to our various instructions this report would here close.'

"I have also on file with said papers the original letter of Governor Harvey, of Kansas, referred to by the Commissioners, addressed to myself, dated June 9th, 1870, to which he declares that, 'on the 6th instant, said road was completed to the south boundary of the State, and on the 7th and 8th instants, I (he) passed over the same, and made a careful and critical examination of its construction and equipment, and hereby certify that said Missouri, Kansas and Texas Railway Company have constructed a first class railroad, beginning at its junc-

tion with the Kansas Pacific Railway at Junction City, from thence in a southeasterly course, to the headwaters of the Neosho River, and thence down the valley of the said River to the State line of the Cherokee Nation, south of the town of Chetopa.'

"Upon the receipt of these documents, I caused the several parties in interest to be notified that at such time as might be convenient to them, I would sit to hear causes shown, if any there were, why said report should not be received as conclusive of the fact that the Union Pacific Railroad Company, Southern Branch, now called the Missouri, Kansas and Texas Railway Company, had first complied with the conditions prescribed for securing the right to construct the trunk road through the Indian Territory.

"On the 9th instant, the said parties appeared before me, and arguments were heard thereon, which have been this day concluded. The point made by the Kansas and Neosho Valley Railroad Company is, that no satisfactory evidence is before the Department that the character of said Southern Branch Pacific Railway is that of a good completed road.

"No testimony was submitted as to the character of the road, but several informal statements, not sworn to, were read, or orally made, and a similar class of statements, by way of rebuttal, was made upon the other side.

"A paper forwarded with the report of the commissioners, was also referred to, as showing that the Southern Branch Road was not equal in the character of its construction to the Kansas and Neosho Valley Road. The circumstances under which the examination of the Commissioners was made, were such as to satisfy me that said paper was not based upon any actual measurements or specific investigations of the Commissioners themselves, but was probably received with an argument and other papers, irregularly submitted to them by Mr. Joy.

"I have therefore confined my considerations, for the present, to the question whether, under the several stat-

utes authorizing the construction of those roads, the certificate of the Governor of Kansas is the conclusive evidence of the character and completion of the road, required by law. It was admitted in the argument before me that such certificate was conclusive and final for the purpose of entitling the Company to its land grants, but not for the purpose of determining its compliance with the 11th section of the Act of July 25, 1866, an determining its right to build the trunk road.

"If such certificate be the conclusive evidence required by law, inquiry as to facts, *ab extra*, must be unnecesary. If it is not conclusive, but the Department or yourself must determine the fact of the sufficiency of the road upon other testimony, then I should not be satisfied with anything less than a complete examination by a scientific commission or a full investigation, upon the sworn evidence of experts, who had made a scientific examination. On the question, what the law requires, as the evidence of the completion of these roads, I find that, substantially, the same provision is contained in both statutes authorizing the construction, respectively, of the Kansas and Neosho Valley Railroad, and the Southern Branch Pacific Railroad.

"The former of these statutes declares that:

'When the Governor of the State of Kansas shall certify that any section of ten consecutive miles of said road is completed, in a good, substantial and workmanlike manner, as a first-class railroad, then the said Secretary of the Interior shall issue to the said Company, patents for so many sections of the land, within the limits above named, as are co-terminous with said completed section, hereinbefore granted; and when certificates of the Governor aforesaid shall be presented to said Secretary, of the completion as aforesaid, of each successive section of ten consecutive miles of said road, the said Secretary shall, in like manner, issue to said Company patents for the land for each of said sections of road, as in the first instance, until said road shall be completed; Provided, That if said road is not complet-

ed within ten years from the date of acceptance of the grant hereinbefore made, the lands remaining unpatented, shall revert to the United States. Section 3, Act of July 25, 1866.'

"The second of said Acts provides for precisely the same mode of determining the completion of the several sections of the road in language not only of the same import, but almost identical in terms, and I find in neither of said acts any other mode of determining the completion or quality of either road down to the southern boundary of Kansas. No boards or commissioners are provided, such as were used in regard to the railways to the Pacific Ocean, and no indication is given of any other evidence of the completion of the road being required, except such certificate of the Governor of Kansas.

"In section 11 of the Act of July 25, 1866, which prescribes the manner in which the race for the northern boundary of the Indian Territory shall be made, no new criterion as to construction is introduced. It simply provides that the company 'first reaching in completion, the said point on the southern boundary of the State of Kansas, shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas,' etc.

"I am forced, therefore, to the conclusion that the completion referred to must be understood to be a completion, in accordance with the terms of the act authorizing the construction of each road, and that when the road is so completed, it would be accepted, and its patents issued under the terms of such statute. We have no further inquiry to make with regard to it.

"I am, therefore, of opinion that such completion and the quality of the road is not a question of fact to be determined upon any other evidence than that which the Statute prescribes, and that the certificate of the Governor of Kansas, that the Southern Branch Pacific Road has reached the northern boundary of the Indian Territory as a completed first-class railroad, is conclusive

evidence of that fact; and, further, that the certificate of Commissioners Hazen and Hoag, that no other road was within fifteen miles of the common point at which said roads were to enter the Indian Territory, is unquestioned by either party, and is, therefore, satisfactory evidence that said Southern Branch Pacific Railroad has first complied with the terms of your order of the 23d of May.

"If you shall agree with me in this conclusion, I recommend that you give the said Union Pacific Railroad Company, Southern Branch, in accordance with the terms of the eleventh section of the Statute of the 25th of July, aforesaid, your written approval to construct and operate its line of railroad from said point on the northern boundary of the Indian Territory to a point at or near Preston in the State of Texas, subject to such conditions as to the mode of construction and completion as may make it fit and sufficient as a trunk road, for the commerce of all the branches, north and south, which may be expected to move over it.

"Down to the southern boundary of Kansas, which was the original terminus for these several roads, under the acts organizing them, no approval was required but that given by the Act of Congress, and no certificate of completion, but that of the Governor of Kansas. Inasmuch, however, as your approval is requisite, by the same statute, to the construction of the trunk, by any company, through the Indian Territory, you are, in my judgment, authorized (and I am well convinced that the public interests require that it should be done) to prescribe such reasonable mode of construction and completion as shall fit such trunk road for all the purposes for which it was intended. The several branches have no interest in the good character and quality of the other branches down to the point of junction, but each has a great interest in having the trunk road so satisfactory and complete a one, that its own business shall not be impeded or its passengers endangered. To secure this end, I would recommend that you prescribe that said trunk road

shall be made upon the easiest grades and curves which are practicable; its road-bed raised above the reach of floods, and thoroughly drained; its bridges and culverts of solid, durable and approved construction; its ties not less than 2,700 to the mile and of hard wood; its rails not less than 56 pounds weight to the yard, thoroughly coupled by the fish joint; and the road throughout its complete length, before it shall be finally accepted, well ballasted with stone, or gravel, and fully furnished with side-track, water and fuel stations and rolling stock, up to the standard required of the railways to the Pacific Ocean. For the purpose of securing such construction, I would recommend that a commission of three competent persons be appointed, whose certificate shall be required in similar manner, and who shall be paid by said Company, at the same rate as was done in the case of the Union Pacific Railroad to the Pacific Ocean.

"I would further recommend that besides the agreement of such Company to comply with these terms, they shall further be required, before entering said Indian Territory, to give bond in a reasonable amount, payable to the United States, or to either of the Indian Nations, through whose territory they may pass, conditioned that they shall in every particular respect the rights of said Indian tribes, and the individuals thereof, as guaranteed by the treaties, and the intercourse and other statutes of the United States; that they shall commit no waste upon said Indian lands, nor take materials therefrom, except under contract with said Indian tribes, or individuals thereof, who may make sales of individual property; such contracts, whether with the nations or individuals, to be valid only when approved by the proper officers of the Indian Department.

"The counsel for the Cherokee Nation, in a written argument filed with me, have urged that no sufficient legislation yet exists to authorize either of the companies who might win the race to the southern boundary of Kansas, to enter the Cherokee Territory, and that further legislation is necessary to protect the

rights of the Indians, and define the manner in which the privilege of entering and building a road should be exercised. After careful examination of this argument, and with the fullest desire to do whatever may be necessary to protect the rights of the Indians in the premises, I am of opinion that the statutory right to enter the Territory is complete upon the fulfillment of the conditions precedent, which have been fixed, and that the necessity for your approval of the acts of the Railroad Company and their mode of construction, together with your undoubted power to suspend their operations in building, whenever they shall cease to conform to the intercourse, laws and other statutes, and to the regulations which you may prescribe, are sufficient to secure proper respect to and observance of all the rights of the Indians in the premises.

"I am, sir, with great respect,

Your obedient servant,

J. D. Cox, Secretary.

"Approved, and the recommendations of the Secretary of the Interior will be carried into execution.

July 20, 1870. U. S. Grant."

Further complaining your oratrix states that on the 22d day of July, 1870, the Secretary of the Interior formally notified the said Missouri, Kansas & Texas Railway Company, that it had, by complying with the conditions precedent, acquired the right to construct its railroad through the Indian Terriory, prescribing certain specifications for its construction and requiring said railway Company to give a bond in a reasonable sum, payable to the United States or to either of the Indian Nations, and authorizing the said Missouri, Kansas & Texas Railway Company, upon the filing of a map of its road and the required bond, to construct its railroad through the Indian Territory, and which said for-

mal notification was in words and figures as follows, to-wit:

"WASHINGTON, D. C., July 22, 1870.
DEPARTMENT OF THE INTERIOR.

"SIR:

"The President has approved the finding of the Secretary of the Interior that the Missouri, Kansas and Texas Railway Company had, by complying with the conditions precedent, become entitled to construct their railroad through the Indian Territory, and has prescribed, that to secure the proper construction thereof, south of the southern boundary of the State of Kansas, the road 'shall be made upon the easiest grades and curves which are practicable; its road bed raised above the reach of floods and thoroughly drained; its bridges and culverts of solid, durable, and approved construction; its ties not less than 2,700 to the mile, and of hard wood; its rails not less than 56 pounds weight to the yard, thoroughly coupled by the fish joint; and the road throughout its complete length, before it shall be finally accepted, well ballasted with stone or gravel, and fully furnished with side-tracks, water and fuel stations, and rolling stock, up to the standard required of the railways to the Pacific Ocean, for the purpose of securing of such construction.....a commission of three competent persons (will) be appointed, whose certificate shall be required in similar manner, and who shall be paid by said Company, at the same rate as was done in the case of the Union Pacific Railroad to the Pacific Ocean.

"Besides the agreement of such Company to comply with these terms, they shall further be required, before entering said Indian Territory, to give bond in a reasonable amount, payable to the United States, or to either of the Indian Nations, through whose Territory they may pass, conditioned that they shall in every particular respect the rights of said Indian tribes, and the individuals thereof, as guaranteed by the treaties, and the intercourse and other statutes of the United States;

that they shall commit no waste upon said Indian lands, nor take materials therefrom, except under contract with said Indian tribes, or individuals thereof, who may make sales of individual property; such contracts, whether with the nations or individuals, to be valid only when approved by the proper officers of the Indian Department.

"The Missouri, Kansas and Texas Railway Company will, therefore, on filing a map of their route, and the required bond, in this Department, be authorized to construct their road through the Indian Territory, to Preston and to Fort Smith, subject, however, to a compliance with the terms and conditions hereinbefore mentioned, and to such orders as may be made by this Department for the purpose of enforcing such terms and conditions.

"Very respectfully, your obedient servant,

J. D. Cox, Secretary.

"Levi Parsons, Esq.,
Pres. M., K. & T. R. W. Co.,
No. 7 Nassau St., New York."

Further complaining your oratrix states that said railway Company gave a bond as required, a copy of which said bond is hereto attached, marked Exhibit "B" and made a part hereof, and also filed in the Department of the Interior maps of definite location of its line of railroad through the Indian Territory (certified copies whereof will be exhibited at the hearing hereof), and immediately began the construction of its line of railway through the Indian Territory as thus definitely located, and constructed and completed the same as required by said acts of Congress, and especially the Act of Congress of July 25, 1866, and also fully complied with the rules and regulations of the Secretary of the Interior so prescribed as aforesaid.

Further complaining your oratrix states that thereafter the President of the United States appointed commissioners to examine the line of railway of the said Missouri, Kansas & Texas Railway Company, as constructed, extending from the southern boundary line of Kansas to the Arkansas River, which said commission examined the said railway between the points aforesaid, and found that the same had in all particulars been constructed and completed as required by law and the regulations of the Department and recommended the acceptance of said railway by the Department, and on May 12, 1872, the Secretary of the Interior transmitted said report to the President, and recommended the acceptance of said railway and telegraph line, and thereafter, and on the 17th day of May, 1872, President Grant approved the recommendations of the commission and the Secretary of the Interior, and directed that they be carried into effect, and which said report of said commission, the recommendations of the Secretary of the Interior, and the approval and directions of the President, were in words and figures as follows:

"SEDALIA, MO., Dec. 21st, 1871.

Department of the Interior.
Jan. 5, 1872.

"SIR:

"The undersigned Commissioners appointed by the President of the United States to examine and report

upon the Railroad of the Missouri, Kansas and Texas Railway Company, from the south line of Kansas to the Arkansas River, in the Indian Territory, have the honor to report the following as the result of their examination:

"In pursuance of said appointment they met at Sedalia, Missouri, the headquarters of said Missouri, Kansas and Texas Railway Company on Tuesday, the 19th day of December, 1871.

"Before proceeding to examination of the road, your Commissioners required the President of the Company to file with us his affidavit, stating therein the commencement, length and termination of the Road, and that it is completed as required by law and the instructions of your office, which affidavit and the profile of the Road, and also a map of the same properly certified by the President and Chief Engineer of the Company are herewith transmitted.

"In pursuance of instructions your commissioners proceeded to the commencement of said Company's line of Railroad at the South line of Kansas, arriving thereat on the morning of Wednesday, the 20th day of December, inst., and passed thence over the entire line of said Railroad to the Arkansas River, making a personal inspection, stopping at all stations, bridges, etc., examining the roadway, grading, masonry, bridges, culverts, tracks and ties, which we found constructed in a good, substantial, and workmanlike manner as a first-class railroad.

"The manner of construction of said railroad is more fully set forth in the report of O. B. Gunn, Chief Engineer of said Railway Company, made to us at our request, which report from our observation we believe to be substantially correct, and the same is herewith transmitted and made a part of our report. The material used in the construction of said Railroad seems to be the best which the country affords. The ties on the entire line are without exception of hard wood, fully up to the regulation standard in size and number; the rails

are of first quality of English iron, weighing 56 lbs. per lineal yard, the joints "fish plated" and rails fully spiked; the culverts and bridges are of the most substantial character and thorough construction, as more fully set forth in said Engineer's report; the side-tracks are ample and conveniently located, and in length exceeding the percentage required.

"The water and depot stations, rolling stock and equipment are ample and of improved construction, and fully adequate for any amount of business that the country is likely to afford.

"The width of embankments and excavations is up to the standard required by your instructions, and the drainage is complete.

"The track is ballasted in the main with top soil: in a few places, however, sand and broken rock has been used, and we are assured by the officers of the company that a better material will be used throughout the entire line as fast as circumstances will admit. The alignment and grades are as represented in the Engineer's report above referred to.

"We deem it proper to state, although specifically not requested to do so, that a single wire telegraph line is built and in operation along the entire line of said Road, constructed of white cedar poles, and such wire as is in common use for telegraph purposes.

"In conclusion, therefore, we respectfully recommend the acceptance of the said Railroad by your Department.

"The additional instructions contained in your communications of Dec. 12, 1871, in regard to the connection of said Railroad with the Atlantic and Pacific Railroad at Vinita, will be the subject of a supplemental report to be transmitted in a few days.

"We have the honor to be, etc.,

C. W. BABCOCK,
WM. VANDEVER,
M. HILTON,
Commssioners

"To the Hon. C. Delano,
Secretary of the Interior,
Washington, D. C.

"Sworn to and subscribed before me this 21st day of December, A. D. 1871. Withness my hand and notarial seal.

L. B. Jackson,
Notary Public.

(seal.)

'Chief Engineer's Office.

M., K. & T. Ry.

Sedalia, Mo., Dec. 19, 1871.

To the Board of Government Commissioners Appointed to Inspect the Missouri, Kansas and Texas Railway.

'Gentlemen:— The section of railroad which you are ordered to inspect, extending from the Southern Boundary of the State of Kansas to the Arkansas River, is 86.76 miles in length, and built in all respects fully up to the standard of first-class Western railroads.

'The alignment of this section is most excellent, being made up generally of long tangents and light curves, 92 per cent of the whole being straight line, and but 8 per cent of curved line, and the curve portion being very light with radii from 5,730 to 11,460 ft.

| | Miles. |
|---|---|
| 'Total length tangent equals | 79.78 |
| Total length 30' curve radius, 11,460 ft | 3.94 |
| Total length 40' curve radius, 8,594 ft | 0.23 |
| Total length 1° curve radius, 5,730 ft | 2.81 |
| 'Total | 86.76 |

| | Miles. |
|---|---|
| 'Longest tangent is | 14.82 |
| Shortest tangent | 0.12 |
| Longest curve | 11.56 |
| Shortest curve | 0.04 |

'GRADIENTS.

'The grades upon a considerable portion of this section are level, while the maximum grade is 52.8 ft. per mile, equal to one foot rise per one hundred feet. Care has been taken to raise all grades across streams and other low places high enough to be above the highest floods known to the country. The grades are as follows:

| | MILES. |
|---|---|
| Level | 22.00 |
| Level to 10 ft. per mile | 7.14 |
| 10 ft. to 20 ft | 10.70 |
| 20 ft. to 30 ft | 16.89 |
| 30 ft. to 40 ft | 15.34 |
| 40 ft. to 52.8 ft | 14.69 |
| Total | 86.76 |

| | MILES. |
|---|---|
| The longest level grade is | 1.47 |
| The longest maximum grade is | 1.06 |

Per cent of level line 25 1-2 per cent.
Per cent of maximum grade, 8 per cent.

'MASONRY.

'All masonry on the line is the best of its class. All of the box culverts are built of the usual class of rubble masonry laid dry.

'All bridge abutments are of bridge masonry, well cut, jointed, and bedded and generally laid in a good bed of quick lime mortar, and is the best of its class. The masonry in the bridge across the Verdigris River is of the very best quality built upon railroads, all closely hammer dressed, and laid up in the very best of hydraulic cement thoroughly girted. No expense has been spared to make it a first-class bridge in every respect.

'The shore abutments are founded on a hard compact clay. The North Pier was sunk in a timber caisson in 16 ft. water and founded upon the rock.

'The South Pier is founded on 63 piles, driven to rock and the heads cut off square and filled around with concrete.

'Rock for this bridge was hauled 2 43-100 miles while rock for some culverts and abutments has been hauled a distance of 7 miles.

'BRIDGES.

'All bridges, exceeding 20 ft. and less than 60 ft. clear spans are of a class known as trussed girder bridges, having their support or trusses of iron placed underneath the track.

'Two spans of 60 ft. each in clear over Wolf and Fisher Creeks and one of 154 ft. over Pryor Creek, are of the well-known Howe Truss Pattern. All of the other spans are of the Post patent Diagonal Truss Pattern, having the bottom chord, and all other parts having tension strains of best wrought iron, while the parts having compression strains only, are of timber, and this timber in all cases of truss bridges, is thoroughly "Burnettized," passing through a chemical process which it is believed will add fully 100 per cent to the lasting quality of the timber.

'In addition to this precaution we intend, the coming season, to house in the top chord and keep the posts and iron work thoroughly painted, so that we confidently believe that no timber work in the bridges will need to be replaced except the floors, for at least 20 years.

'The spans of truss bridges over 40 ft. are as follows in their order:

| | |
|---|---|
| Russell Creek | 100 ft. clear span |
| Little Cabin Creek | 100 ft. clear span |
| Big Cabin Creek | 150 ft. clear span |
| White Oak Creek | 100 ft clear span |
| Rock Creek | 122 ft. clear span |
| Wolf Creek | 60 ft. clear span |

Pryors Creek .....150 ft. clear span
Chouteau Creek ..... 80 ft. clear span
Flat Rock Creek ..... 80 ft clear span
Fisher Creek ..... 60 ft. clear span
Verdigris River .....500 ft. total

'Two spans of 150 ft. each and middle span of 200 ft. Of stringer bridges, ranging from 10 to 20 ft, opening, there are 51.

'Of trussed girders 30 ft. opening there are 13. Of trussed girds of 40 ft. opening, there are 4.

'There is also on Pryors Creek bottom 100 ft. of pile bridging across a slough, where it was deemed better adapted than any other structure. There is also a trestle bridge 90 feet long in the Arkansas bottom across a pond now drained where rock could not be hauled, and the nearest obtainable rock was 9 miles distant.

'Track.

'The track is laid on best English iron, weighing 56 lbs. per lineal yard, with "fish plate joints" full spiked throughout and with four spikes to each tie, and is all in good line and surface. The track is ballasted generally in the way common to Western roads of filling and surfacing with the black top mould, which answers a good purpose, and some short sections have been ballasted with broken rock.

'About four miles between the Arkansas and the Verdigris Rivers have been ballasted with sand from the bank of the Arkansas River, which makes an excellent ballast.

'It is intended eventually to ballast the whole road with sand, gravel or broken rock.

'Ties.

'The ties are generally of white burr and pin oak, and red elm, with a few black oak, locust and mulberry.

'They are 8 feet long, leaved on opposite sides, 6 inches thick, and generally from 6 to 8 inches face, and are

believed to be fully up to the standard required, and much better than those used on most new Western roads.

'On a large proportion of the line, timber for ties could only be had from remote points, involving a haul of from five to eight miles, while the most northerly portion had to be supplied from points on the Missouri Pacific R. R. and hauled by cars nearly 200 miles. The ties are laid at the rate of 2,640 to the mile.

'Side Tracks.

'There are eight side tracks on the section, exclusive of two or three that are of a temporary character. They are as follows:

| | |
|---|---|
| Blue Jacket | 1,200 ft. |
| Vinita | 1,600 ft. |
| Big Cabin | 1,350 ft. |
| Fourth Siding | 1,000 ft. |
| Pryors Creek | 1,750 ft. |
| Chouteau | 1,778 ft. |
| Flat Rock | 2,004 ft. |
| Gibson | 1,980 ft. |

Total 13,554 ft.—2 58-100 miles, or about three per cent of the whole section.

'Depots and Water Stations.

'There are three (3) depots upon the Section, to-wit, at

Big Cabin Station,
Chouteau Station, and
Gibson Station.

'Also four water stations, at:

Russell Creek.
Big Cabin,
Flat Rock and
Verdigris River.

'Rolling Stock.

'As this Company is operating nearly 500 miles of road, less than one-fifth of it being in the Indian Territory, an enumeration of the particular engines, cars, etc., belonging to this section of road is impossible. In the construction account, $226,000 have already been charged up to this section, as the proper proportion of its equipment, being about $2,600 per mile.

'A telegraph line has also been completed the whole length of this section, built in the best manner, the poles all being of white cedar from the State of Michigan.

'Telegraph offices are established at Big Cabin, Chouteau and Gibson Stations, the last being the station for the Government post of Fort Gibson, located six miles distant.

'I deem it proper to state in reference to the continuation of this road south of the Arkansas River, that it is all under contract to Red River, the southern boundary of the Indian Territory. Upwards of forty additional miles are already graded and ready for the track, and a large force of workmen engaged in the work of construction at and below the Canadian River, and track laying will proceed rapidly as soon as the great bridge across the Arkansas River, a very fine structure of 840 feet in length, is completed, which will be done during the present week.

'Accompanying this report is a map showing the alignment, topography near the line, crossing streams, location of side tracks, tanks and depots. Also a profile showing the grades, cuts, fills, locations and character of bridges and culverts. Both map and profile have been made as complete as possible.

'I have the honor to be, very respectfully,

Your Obedient Servant,

O. B. Gunn,
Chief Engineer, M. K. & T. Ry.'

"DEPARTMENT OF THE INTERIOR.

WASHINGTON, D. C., 12th May, 1872.

"SIR:— I have the honor to transmit herewith, for your action the report, dated 21st December, 1871,—of Messrs. Babcock, Vandever and Hilton, Commissioners appointed by you on the 28th Nov. last to examine and report upon the Missouri, Kansas & Texas Railway from the South line of Kansas to the Arkansas River, in the Indian Territory, a distance of 86 76-100 miles. The Commissioners report that the road is constructed in a good substantial and workmanlike manner, as required by law and the instructions of the Department, and that there is a telegraph line completed the entire lengh of the road. I, therefore, respectfully recommend the acceptance of said road and telegraph.

"Very respectfully, Your obedient servant,

B. R. COWAN,
Acting Secretary.

"TO THE PRESIDENT.

(Endorsed)—"Department of the Interior, 17 May, 1872.

"Mo., K. & T.— Hon. H. B. Cowen, Acting Secretary, recommends acceptance of road and telegraph line of the Mo., Kansas & Texas R. W. Co. from the Southern line of Kansas to the Arkansas River, a distance of 86 76-100 miles.—S.

"Executive Mansion, May 17, 1872.— The within recommendations of Acting Secretary of the Interior are approved, and the Department will carry them into effect.—U. S. Grant.

Notified Prest. of Co. Comr. G. L. O. L. Com'r. Indian Affairs of acceptance 18 May, '72."

Further complaining your oratrix states that thereafter, and on the 13th day of January, 1873, the Commissioners appointed by the President to examine that part of the railway of the Missouri, Kansas & Texas Railway Company extending from the Arkansas River

to the Red River, near Denison, Texas, made its report finding that that part of the railway of said Company had been constructed according to the provisions of the acts of Congress and of the regulations of the Department, and on March 10, 1873, the Secretary of the Interior transmitted said report to the President, and recommended the acceptance of said railway, and President Grant, on the 11th day of March, 1873, approved said recommendations, and accepted the railway, and which said report, recommendations of the Secretary of the Interior, and the approval thereof by President Grant, were in words and figures as follows:

"Department of the
Feb.
26,
1873.
Interior.

ST. LOUIS, MO., January 13, 1873.

"SIR:

"The undersigned, Commissioners appointed by the President under order from your Department of the date of 10th December, 1872, to examine that portion of the completed line of the Missouri, Kansas and Texas Railway, commencing at the end of the 86.76 mile (South of the Southern boundary of Kansas), and ending at Red River, near Preston, Texas, have the honor to report:

"That they met at Sedalia, Mo., on the morning of the 8th of January, 1873, and entered upon the discharge of the duties assigned them by the Commission. Proceeding to the initial point indicated in their instructions— which is the crossing of the Arkansas

River, 86.76 miles South of the Kansas line, the Commissioners commenced their examination, moving southward and carefully inspecting road-bed, superstructure, bridges, buildings, etc., over the entire distance to Red River, having with them O. B. Gunn, Chief Engineer of the Company, to explain all matters not obvious to the sight of the Commissioners. Having spent sufficient time in the examination to satisfy themselves fully as to the facts, your Commissioners are prepared to submit the following report:

"*Location:*

"They find that the entire line from Arkansas to Red River is well located, showing care and skill in the selection of the route, and in turning the natural obstacles that were met in the way.

"*Grade and Curves:*

"The grades of the road are excellent, nearly one-third is level, more than half the distance under thirty feet to the mile, and where the nature of the ground compels a steeper grade, it has in all cases, although in some instances at very considerable cost, been kept under fifty-three feet to the mile.

"The curves are all easy, and a very large per cent of the line is tangent, the entire length of the road, in fact, exceeding but slightly the air line between the initial and terminal point. These favorable facts will insure not only great speed, but an unusual degree of safety in the running of trains over this very important road.

"*Embankments:*

"The embankments have obviously been built according to the requirements of the Government, and although those freshly thrown up had in some localities been seriously washed by heavy rains just preceding the visit of the Commissioners, the Company exhibited a proper vigilance in the premises by the presence of working parties engaged in their repair.

"*Excavations:*

"The excavations, both of earth and rock, were found in all cases to accord with the requirements of the Government.

"*Mechanical Structures:*

"The culverts and abutments for bridges and drains, for about one hundred and twenty miles south of the initial point of this examination, are of stone. The more important masonry exhibited in the abutments and piers of the bridges over the Arkansas, the Canadian and Red River, and other considerable water courses, is of an exceptionally massive and admirable character. It would be creditable on any road in the country. On the lower portion of the road, stone suitable for masonry was not in all cases accessible, and pile and trestle work has in part been resorted to. But this class of work has been well done and insures a safe roadway, and durable for some years to come. It would be economy and add nothing to the security or usefulness of the road to remove this class of work when well put in, until it has performed the service it is capable of. In regard to all the bridges of the road examined, the Commissioners report them compact and of a strength many times exceeding any probable strain upon them.

"The timbers are well selected, of the best wood, and burnetized, and every device will, we are assured, be resorted to to render them durable.

"*Sidings:*

"The side tracks of the road exceed the per cent indicated as sufficient by the Department.

"*Ballasting:*

"There is no suitable material found for ballasting on the line of the road, and if stone be used, it will require to be crushed for the purpose. Arrangements for do-

ing this by suitable machinery are, we are informed, being made by the Company. In the absence of stone or gravel for immediate use, the Company have ballasted a large portion of the road, and are ballasting the remainder, with the material of which their roadbed is formed. The portion of the road that has been built and ballasted in this way long enough for the embankments to have become well settled is remarkably smooth; and, except in seasons of excessive frost and rain, not often experienced in the region where the road runs, will meet every requirement of a first-class railroad. The entire roadbed is well lifted up and sloped, and the sides carefully ditched, securing a drainage that gives both elasticity and solidity to the roadway, and leaves little to be asked for in the way of ballasting. Unless it is the interest of the Company to substitute a ballasting of crushed stone at an expense not warranted by any inferior service of the road as it is, the Government will promote no public interest by insisting on it—at least not faster than the Company will be willing to do it. It should be done at a moderate and economical rate of progress.

"*Cross Ties:*

"It is a source of satisfaction to the Commissioners to say that a better lot of ties, or of hard wood, they have never seen on any road than are found on the entire length of the M., K. & T. Road, and their number to the mile fully meets the requirements of the Department.

"*Rails:*

"The rails laid are of English manufacture, weighing fifty-six pounds to the yard; the rails coupled invariably by fish joint and spiked to every tie.

"*Rolling Stock:*

"The rolling stock is sufficient for the present use of the road, but will not long continue so. The early con-

nection of the track of the M., K. and T. Railroad with that of the Texas Central will unquestionably open up an enormous traffic over the line of the M., K. and T. Road, exceeding that of most roads in the West. The interest of the Company will compel them to increase the equipage of the road as its business demands.

"*Buildings:*

"The engine houses, repair shops, warehouses and station buildings are sufficient for the present use of the road, and their style of structure is such as the Department has prescribed. Water Stations are provided at convenient distances, and fuel depots, where excellent coal from mines on the line of the road, of limitless quantity, is stored for the use of the trains.

"The Commissioners have thus presented in brief, and general, but they trust, sufficiently full and explicit terms, the result of their examination of the line of the M., K. and T. Road, under your instructions of 10th December, 1872. They refer to the accompanying maps and statements of O. B. Gunn, Chief Engineer, for more detailed and technical information. The Commissioners close with the general remark, that in their judgment the Missouri, Kansas and Texas Railway Company have performed their work in perfect good faith, have complied, as far as practicable, with all requirements of the Government, have built a first-class railroad, which they are impelled by the immense value of the property and the very great revenue it will soon be capable of producing, to maintain in good condition and steadily increase in effectiveness: All doubt may be considered fairly removed as to the interest of the Government being fully protected, and the Commissioners recommend that the road be accepted. It is no part of the Commissioners' duty to go outside of their instructions to express opinions as to any personal merit exhibited in the location and construction of the Missouri, Kansas and Texas Railway, but when it is considered that the line of the Road crosses all the streams

of drainage for the territory through which it is built, they are constrained to record the opinion that the low grades and slight curvature obtained, as well as the general thoroughness of construction, evince a remarkable success of engineering skill, and confer signal credit upon the Engineering Department of the Company.

"All of which is respectfully submitted,

WM. VANDEVER,
A. S. MITCHELL,
WALTER L. MAYO.

'HON. C. DELANO,

'State of New Jersey, Union County —ss.

"Be it remembered that on the third day of February, 1873, before me, a Notary Public of the State of New Jersey, personally appeared Abram S. Mitchell, who is known to me to be the individual who has subscribed the within instrument, upon being duly sworn, doth depose, and on his oath say that the several matters stated therein are correct and true.

SAMUEL S. MOORE,
Notary Public.

(SEAL.)

Report of Commissioners on the part of the United States appointed to examine M., K. & T. Railway. Filed January, 1873.

Department of the Interior. Jan. 29, 1873.

"State of Iowa, Dubuque County — ss.

"Be it remembered that on this 7th day of February, A. D. 1873, before me a Notary Public of Iowa in and for Dubuque County, personally appeared Wm. Vandever, who is personally known to me to be the identical person who subscribed the within instrument, and being duly sworn upon his oath, deposes and say that the matters and things therein stated are correct and true.

WM. VANDEVER, JR.,
(SEAL.) Notary Public.

"State of Kansas, County of Leavenworth — ss.

"Be it remembered that on this 18th day of February, A. D. 1873, before me, a Notary Public of Kansas and for Leavenworth County, personally appeared Walter L. Mayo, who is personally known to me to be the identical person who subscribed the within instrument, and being duly sworn upon his oath, deposes and says: The matters and things therein stated are correct and true.

J. W. NEIHAUS,
(SEAL.) Notary Public.

'CHIEF ENGINEER'S OFFICE.

MO., KAN. AND TEX, RAILWAY.

SEDALIA, Jan. 13, 1873.

'To the Board of Government Commissioners Appointed to Inspect the Missouri, Kansas and Texas Railway.

'GENTLEMEN: — The Section of railway which is offered for your inspection extends from the North Bank of the Arkansas River to the Red River, which is the boundary line between the Indian Territory and the State of Texas, a distance of 155.35 miles, and it is built in all respects fully up to the standard of first-class Western Railroads.

'The alignment of the Section is very direct, being

made up generally of long tangents and light curves, and adheres so nearly to the air line that the excess in length of located line over air line is but 3.44 miles, showing a loss in distance over an air line of only about 2 per cent. 81 per cent of line is made up of tangents and 19 per cent of curved line, with shortest radius of 1,432 ft. and longest radius of 22,920 ft.

| | Miles. |
|---|---|
| Total length of tangent is | 126.02 |
| Total length, curves under 1 deg. rad. 22,920 to 5,730 ft. is | 5.93 |
| Total length, curves, 1 deg. to 2 deg., rad. 5,730 to 2,865 ft. is | 15.81 |
| Total length, curves, 2 deg. to 3 deg. rad., 2,865 to 1,910 ft. is | 7.43 |
| Total length, curves 3 deg. to 4 deg., rad. 1,910 to 1,432 ft. is | 0.16 |
| Total | 155.35 |

| | Miles. |
|---|---|
| Longest tangent is | 7.00 |
| Longest curve is | 0.75 |

'The grades upon a considerable portion of the line are level, while the maximum grade is 52.8 ft. per mile, equal to one foot rise in 100 ft. Care has been taken to raise all grades across streams, bottom lands, and other low places high enough to be above the highest floods known to the country.

'The grades are as follows :

| | Miles. |
|---|---|
| Level grade | 36.63 |
| Level to 10 ft. | 9.00 |
| 10 ft. to 20 ft. | 15.95 |
| 20 ft. to 30 ft. | 21.21 |
| 30 ft. to 40 ft. | 36.96 |
| 40 ft. to 52.8 ft. | 35.60 |
| Total | 155.35 |

| | Miles. |
|---|---|
| The longest level grade is | 0.87 |
| The longest maximum grade is | 1.40 |

| | Per. Cent. |
|---|---|
| Per cent of level grade is | 23 1-2 |
| Per cent of maximum grade is | 11 |

'Masonry and Bridges.

'All the masonry on the line is of the best of its class, and no timber, trestle or pile bridges are used until a point within 42 miles of Red River is reached, where no stone could be found suitable for railroad purposes, and the railway company was obliged to resort to pile and trestle work for a greater part of this distance.

'The bridges across the larger streams, to-wit: the Arkansas, North Fork of Canadian and South Canadian Rivers are all built on piers and abutments of first-class hammer dressed masonry, laid in hydraulic cement with foundations all sunk to bed rock. Rock for masonry has, in many instances, been hauled long distances, that for the Arkansas bridge having been hauled with teams a distance of 9 miles.

'All bridges exceeding 20 ft. span and less than 50 ft. are of the class known as trussed girders, having their supports or truss of iron placed underneath the track.

'Spans of 58 and 68 ft. are of the well-known Howe Truss Pattern, and all spans of over 68 ft. in length are of the pattern known as the "Post Combination Diagonal Truss," having the bottom chords and all other parts having a tension strain of best wrought iron, while the parts sustaining compression strains only are of wood, and the pieces of timber are in all cases thoroughly "Burnettized," passing through a chemical process, which it is believed will add fully 100 per cent to the life of the timber.

'In addition to this precaution it is intended to house in the top chords and paint the posts and studs so that

it is believed that the timber work will last at least 20 years.

'The pile and trestle bridges used on the 42 miles nearest Red River are built according to the usual plans.

'The piles and trestle bents being of oak timber, and the stringers of pine, all thoroughly framed and bolted together and well secured by lateral and diagonal bracing.

'The bridges upon this section are as follows:

Arkansas River, 845 ft. long, 4 spans, 200 ft. each, and 1 45-ft. girder.

| | |
|---|---|
| Coodeys Creek | 68 ft. long |
| Butler Creek | 88 ft. long |
| Elk Creek No. 1 | 108 ft. long |
| Elk Creek No. 3 | 108 ft. long |
| Elk Creek No. 4 | 58 ft. long |
| Elk Creek No. 4 (Howe Truss) | 58 ft. long |
| Elk Creek No. 5 | 108 ft. long |
| Elk Creek No. 6 | 88 ft. long |

North Fork Canadian, 409 ft. long, 2 spans, truss and 2 girders. Canadian River, 545 ft. long, 3 spans, truss and 1 girder.

| | |
|---|---|
| Turkey Creek No. 1 | 88 ft. long |
| Turkey Creek No. 2 | 88 ft. long |
| Rock Creek | 149 ft. long |
| Coal Creek | 149 ft. long |
| Perryville Creek | 88 ft. long |
| Ward's Creek | 109 ft. long |
| Limestone Creek | 118 ft. long |
| North Boggy River | 169 ft. long |
| Middle Boggy River | 169 ft. long |
| South Boggy River | 169 ft. long |
| Davis Cr. No. 1 | 88 ft. long |
| Davis Cr. No. 2 | 68 ft. long |
| Davis Cr. No. 3 | 68 ft. long |
| Davis Cr. No. 4 | 68 ft. long |

| | |
|---|---|
| Blue River | 149 ft. long |
| West Fork Mineral Bayou | 68 ft. long |
| Mineral Bayou | 68 ft. long |
| Island Bayou | 119 ft. long |
| Red River | 570 ft. long |

Of stringer bridges ranging from 6 to 20 ft. clear opening with masonry abutments, there are 114. Of trussed girders, 30 ft. clear span, there are 16. Of trussed girders of 40 feet there are 21. Of trestle and pike bridges, there are 5,706 lineal feet.

'Track and Ballast.

'The track is laid with best English iron weighing 56 lbs. per lineal yard, with "fish-plate" joints, full spiked with 4 spikes to each tie.

'The track is ballasted throughout, generally with the top earth or mould. Some short sections are ballasted, with broken rock, and several miles in the aggregate with sand, which is found in several places along the line of the road. It is intended eventually to ballast the whole line with broken rock, and two rock-crushers are already purchased for that purpose, and will be put into operation in the spring.

'Ties.

'The ties are all of white, burr and post oak. They are 8 feet long, hewed on opposite sides, 6 inches thick, and 8 inches face on each side, and in size are considerably above the standard required. The ties are all laid two feet from center to center, making 2,640 per mile.

'Side Tracks.

'There are fourteen side tracks on this section, as follows:

| | |
|---|---|
| Muskogee | 3,886 ft. |
| Oak-taha | 1,255 ft. |
| North Fork | 1,357 ft. |

| | |
|---|---|
| Grayson spur | 547 ft. |
| South Canadian | 1,595 ft. |
| Reams | 1,056 ft. |
| McAllister | 6,752 ft. |
| Perryville | 2,100 ft. |
| Limestone Gap | 2,593 ft. |
| Atoka | 3,525 ft. |
| Caney | 850 ft. |
| Caddo | 2,560 ft. |
| Durant | 1,400 ft. |
| Red River | 3,500 ft. |
| Total | 32,976 ft. |

equal to 6 24-100 miles, or over 4 per cent of entire line.

'Embankments and Cuts.

The embankments have all been built twelve feet wide at grade line, for those less than six feet high, and fourteen feet wide for those exceeding six feet high. In some places the fall rains have washed a portion of embankments, but all deficiencies are being made good by construction trains. All cuts, both earth and rock, are taken out twenty feet wide at grade line, and all cuts are well ditched so as to give proper drainage, and keep the roadbed in good condition.

'Depots and Water Stations.

'There are five depots on this section as follows:

Muskogee Depot and Round House.
North Fork depot.
Atoka Depot and Turntable.
Caddo Depot.
Red River Depot and Turntable.
There are also water stations at:
Elk Cr.
Jones Cr.

Turkey Cr. No. 1.
Turkey Cr. No. 2.
Perryville Cr.
Limestone Gap.
Middle Boggy.
South Boggy.
Blue River.
Mineral Bayou.

'Rolling Stock.

'As the Company is now operating 643 miles of completed railway only about one-third of which is located in the Indian Territory, an enumeration of the particular locomotives, cars, etc., belonging to this portion of the road is impossible. The road is well equipped throughout with rolling stock of all kinds sufficient to do all business likely to offer for many months to come. No machine shops are located in the Indian Territory, but very large manufacturing shops are being constructed at Parsons, 26 miles north of the southern boundary of Kansas, which, when completed, will cover 5 acres of ground. Repair shops will also be built at Denison, Texas, the present southern terminus of the road and five miles south of Red River.

'Accompanying this report is a map showing the alignment topography near the line, crossings of streams, location of side tracks and depots.

'Also a profile showing the grades, cuts, fills, location and character of bridges and culverts.

'Both map and profile have been made as complete as possible.

'I have the honor to be, Very respectfully,

Your obedient servant,

O. B. Gunn.
Chief Engineer Mo. and Texas Railway.'

"(Endorsed) — Report of the Chief Engineer of the Missouri-Texas Railway to the Government Board of

Commissioners appointed to inspect the 2nd and last section in the Indian Territory—Jan. 13, 1873—Department of the Interior, Jan. 29, 1873.

Lands and Railroads.

DEPARTMENT OF THE INTERIOR,

Washington, D. C., 10th March, 1873.

. . . . . .

: :
: "Department of the :
: Interior. :
: March :
: 12, :
: 1873. :
: :

. . . . . .

"SIR: I have the honor to transmit herewith, for your action, the report—dated 13th January, 1873—of Messrs. Vandever, Mitchell & Mayo, Commissioners, appointed by you on the 9th December last, to examine and report upon the Missouri, Kansas and Texas Railway from the 86.76 mile (south of the southern boundary line of Kansas) to Red River, near Preston, Texas, a distance of 155.35 miles.

The Commissioners in their report state that the road is constructed in a good, substantial and workmanlike manner, as required by the law and the instructions of the Department, with the exception of the ballasting. I respectfully recommend the acceptance of said portion of road, on condition that the ballasting be hereafter made to conform to the requirements of this Department. Very respectfully,

Your obedient servant,

B. R. COWEN,
Acting Secretary.

"To the President.

(Endorsed) — 'Mo., Kansas & Texas — Department of the Interior, 10th March, 1873. B. R. Cowen, Acting Secretary—submits to the President report of Commissioners on 155.35 miles of Mo., K. & T. Ry. (Notified Prest. of Co., Comr. G. L. O. Actg. Comr. Indn. Affairs, 12th March, 1873'.

"Executive Mansion, March 11th, '73. The within recommendations are approved. U. S. GRANT."

Further complaining, your oratrix states that the United States of America, by said acts of Congress of July 25 and 26, 1866, granted and conveyed to the State of Kansas, as trustee for the use and benefit of said Missouri, Kansas & Texas Railway Company, all of its right, title, interest and estate in and to, and being the fee simple title, to every alternate section of land, or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of the said railway through the Indian Territory, within twenty miles of and from the line of said road, subject only to such communal possessory rights therein and thereto as then existed in the Cherokee, Creek, Choctaw and Chickasaw tribes of Indians under treaties between said tribes and the United States of America.

Further complaining, your oratrix states that at the time of the said conveyance of said lands to the State of Kansas as trustee for the use and benefit of said Railway company, the United States of America was the owner in fee simple of all of said lands, by and under a treaty between the President of the United States of America and the First Consul of the French Republic in the name of the French people, dated April 3, 1803, wherein and whereby the French Republic, by and through its First Consul, ceded said lands to the United States of America.

Further complaining, your oratrix states that on January 24, 1826, the Muskogee or Creek Nation or Tribe of Indians and the United States of America entered into a treaty whereby the Creek Nation agreed to cede to the United States certain lands in the State of Georgia in consideration of certain annuities and payments therein provided to be made by the United States of America, and by section 6 of said treaty a deputation of Indians was provided for to examine the Indian country west of the Mississippi River, and not within any of the states or territories and not possessed by the Choctaws or Cherokees.

Further complaining your oratrix states that on March 24, 1832, the Muskogee or Creek Nation or Tribe of Indians and the United States of America, entered into a treaty whereby the said Creek Indians ceded to the United States all of their rights to lands east of the Mississippi River, and the United States engaged to provide a country for the Creek Indians west of the Mississippi River; and article 14 of said treaty reads as follows:

"The Creek country west of the Mississippi shall be solemnly guaranteed to the Creek Indians, nor shall any State or Territory ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves, so far as may be compatible with the general jurisdiction which Congress may think proper to exercise over them. And the United States will also defend them from the unjust hostilities of other Indians, and will also, as soon as the boundaries of the Creek country west of the Mississippi are ascertained, cause a patent or grant to be executed to the Creek tribe, agreeably to the 3rd section of the Act of Congress of May 2d (28), 1830, entitled 'An Act to provide for an exchange of lands with the Indians

residing in any of the States or Territories, and for their removal west of the Mississippi.'"

Section 3rd of the act of Congress of May 2 (28), 1830, referred to in said section 14 of said treaty, reads as follows:

"And be it further enacted, That in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guaranty to them, and their heirs or successors, the country so exchanged with them; and if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: Provided always, That such lands shall revert to the United States, if the Indians become extinct, or abandon the same."

Further complaining your oratrix states that on February 14, 1833, the Muskogee or Creek Nation or Tribe of Indians entered into a treaty with the United States of America reciting that the Creek Indians had sent a deputation to examine the Indian country west of Mississippi River for the purpose of selecting grounds for their future home, and by article 2nd of that treaty the Creek country west of the Mississippi River is specifically described. Article 3 of that treaty provides that "The United States will grant a patent, in fee simple, to the Creek Nation of Indians for the land assigned said Nation by this treaty or convention, whenever the same shall have been ratified by the President and Senate of the United States—and the right thus guaranteed by the United States shall be continued to said tribe of Indians, so long as they shall exist as a nation, and continue to occupy the country hereby assigned them."

Article 8 of said treaty provides that the country thereby provided for the Creek Indians should be in lieu of and be considered to be the country provided or intended to be provided by the treaty of January 24, 1826, under which the Creeks removed to the country west of the Mississippi River.

Further complaining, your oratrix states that on August 7, 1856, the Muskogee or Creek Nation or Tribe of Indians and the Seminole Nation or Tribe of Indians entered into a treaty with the United States of America, whereby the Creek Indians granted unto the Seminole Indians certain of their lands, and by article 2 the boundaries of the Creek Nation thus limited are specifically described and fixed.

Article 3 of said treaty reads as follows:

"The United States do hereby solemnly guarantee to the Seminole Indians the tract of country ceded to them by the first article of this convenion; and to the Creek Indians, the lands included within the boundaries defined in the second article hereof; and likewise that the same title and tenure by which they were guaranteed and secured to the Creek Nation by the fourteenth article of the treaty of March twenty-fourth, eighteen hundred and thirty-two, the third article of the treaty of February fourteenth, eighteen hundred and thirty-three, and by the letters-patent issued to the said Creek Nation, on the eleventh day of August, eighteen hundred and fifty-two, and recorded in volume four of records of Indian deeds in the office of Indian Affairs, pages 446 and 447. Provided, however, That no part of the tract of country so ceded to the Seminole Indians shall ever be sold, or otherwise disposed of without the consent of both tribes legally given."

And Article 20 of said treaty reads as follows:

"The United States or any incorporated company, shall have the right of way for railroads, or lines of telegraphs, through the Creek and Seminole countries, but in the case of any incorporated company, it shall have such right of way only upon such terms, and payment of such amount to the Creeks and Seminoles, as the case may be, as may be agreed upon between it and the national council thereof; or, in case of disagreement by making full compensation, not only to individual parties injured, but also to the tribe for the right-of-way, all damage and injury done to be ascertained and determined in such manner as the President of the United States shall direct. And the right-of-way granted by either of said tribes for any railroad shall be perpetual or for such shorter term as the same may be granted, in the same manner as if there were no reversion of their lands to the United States provided for, in case of abandonment by them, or of extinction of their tribe."

Further complaining your oratrix states that on June 14, 1866, the Muskogee or Creek Nation or Tribe of Indians and the United States of America entered into the treaty hereinbefore referred to, reciting that whereas the Creeks had made a treaty with the so-called Confederate States on the 10th day of July, 1861, whereby they ignored their allegiance to the United States, and unsettled the treaty relations existing between them, and rendered themselves liable to forfeit to the United States all benefits and advantages enjoyed by them in lands, annuities, protection and immunities, including their lands and other property held by grant or gift from the United States, it was, among other things, agreed that the Creeks should cede and convey to the United States, to be sold by and used for homes for such civilized Indians as the United States might choose,

the west half of their entire domain, to be divided by a line running north and south, the eastern half of said Creek lands being retained by them, to be, except as therein otherwise stipulated, "forever set apart as a home for said Creek Nation." And by article 5 of said treaty the Creek Nation granted a right-of-way through their lands, to the Choctaw and Chickasaw country, to any company authorized by Congress which should, with the express consent and approbation of the Secretary of the Interior, undertake to construct a railroad from any point north of to any point in or south of the Creek country. By article 12 of said treaty the United States reaffirms and reassumes all obligations of treaty stipulations with the Creek Nation entered into before the treaty of the said Creek Nation with the so-called Confederate States, not inconsistent with the terms of said treaty of June 14, 1866.

Further complaining your orator states that the following is a copy of the patent or deed of the United States to the Creek Nation, referred to in said treaty of 1856, between the Creek Nation and the United States of America:

"THE UNITED STATES OF AMERICA.

" *To All Who Shall See These Presents, Greeting:*

" WHEREAS, A treaty was made and concluded on the fourteenth day of February, in the year of our Lord Eighteen Hundred and Thirty-three, in the words following, to-wit:

'Art. 2nd. The UNITED STATES hereby agree with the consent of the Creek and Cherokee Delegates this day obtained, that the Muskogee or Creek Country west of the Mississippi shall be embraced within the following boundaries, viz: Beginning at the mouth of the North

Fork of the Canadian River and run northerly four miles, thence running a straight line so as to meet a line drawn from the South Bank of the Arkansas River opposite to the east or lower bank of Grand River at its junction with the Arkansas, and which runs a course south 44 degrees, west one mile, to a post placed in the ground, thence along said line to the Arkansas, and up the same and the Verdigris River to where the old Territorial line crosses it, thence along said line north to a point twenty-five miles from the Arkansas River where the old Territorial line crosses the same; thence running at right angles with the Territorial line aforesaid, or west, to the Mexico line; thence along the said lines southerly to the Canadian River; or to the boundary of the Choctaw country; thence down said river to the place of beginning.

'The lines hereby defining the country of the Muskogee Indians on the north and east, bound the country of the Cherokees along these courses as settled by the treaty concluded this day between the United States and that tribe.

'Art. 3rd. The United States will grant a patent in fee simple to the Creek Nation for the land assigned said Nation by this Treaty or Convention, whenever the same shall have been ratified by the President and Senate of the United States; and the right thus granted by the United States shall be continued to said Tribe of Indians so long as they shall exist as a Nation and continue to occupy the country hereby assigned them.

'Art. 4th. It is hereby mutually understood and agreed between the parties to this Treaty that the land assigned to the Muskogee Indians by the second article thereof, shall be taken and considered as the property of the whole Muskogee or Creek Nation as well as those now residing upon the land as of the great body of said Nation who still remain on the east side of the Mississippi; and it is also understood and agreed that the Seminole Indians of Florida, whose removal to this

country is provided by their Treaty with the United States dated May 9th, 1832, shall also have a permanent and comfortable home on the lands hereby set apart as the country of the Creek Nation; and they, the Seminoles, will hereafter be considered a constituent part of said Nation, but are to be located on some part of the Creek Country by themselves; which location will be selected for them by the Commissioners who have signed these Articles of Agreement or Convention.'

"Now, know ye, that the United States of America, in consideration of the premises and in conformity with the above recited provisions of the Treaty aforesaid, have given and granted, and by these presents do give and grant unto the said Muskogee or Creek Tribe of Indians the tract of country above described. To have and to hold the same unto the said Tribe of Indians so long as they shall exist as a Nation and continue to occupy the country hereby assigned to them.

"IN TESTIMONY WHEREOF, I, MILLARD FILLMORE, PRESIDENT of the United States of America, have caused these letters to be made patent and the seal of the Department of the Interior to be hereto affixed.

"Given under my hand at the City of Washington the Eleventh day of August, in the year of Our Lord One Thousand Eight Hundred and Fifty-two, and of the Independence of the United States the Seventy-seventh.

MILLARD FILLMORE.

By the President,

ALEXANDER H. H. STUART,

Secretary Department of the Interior.

PHILLIP H. RAIFORD,

United States Agent for the Creek Indians.

Engrossed from the original draft sent to this office by the Commissioner of Indian Affairs.

Bureau of the Corps of the Topographical Engineers, August 7th, 1852.

JOHN I. ABEST,

Col. Corps of Engineers."

Further complaining your oratrix states that said Missouri, Kansas & Texas Railway Company from the date of the construction and completion of it railway through the Indian Territory and through the Muskogee or Creek Nation, including the lands of the Muskogee or Creek Nation, has maintained and operated the same in accordance with said Acts of Congress and treaties, and is now operating the same as therein provided and required.

Further complaining your oratrix states that the said Railway through the Indian Territory was constructed from the sale of bonds of said Railway Company secured by mortgage of said Railway Company to the Union Trust Company of New York, dated January 1, 1871, which said mortgage, among other things, covered:

> "All the privileges and franchises acquired by the said party of the first part, under and by virtue of two several Acts of Congress, approved July 25, 1866, and July 26, 1866, and the order and approval by the President of the United States thereupon, to extend, construct and operate the said line of railroad from the said southern boundary line of the State of Kansas, southerly through the Indian Territory to the northern boundary line of the State of Texas, to a point at or near the town of Preston in said State, a distance of two hundred and fifty miles, more or less; and also all the right, title and interest, which the party of the first part now has, or may hereafter acquire by reason of constructing the extension of the said line of railroad through the Indian Territory, in and to any land or lands granted by the Acts of Congress aforesaid, or which the said party of the first part now has or may hereafter acquire under and by virtue of any treaty or treaties from any Indian nation or tribe, or otherwise howsoever, appertaining to the aforesaid ex-

tension, together with all the rights, privileges, tenements, hereditaments and appurtenances that may belong or appertain thereto, the land granted under said acts of Congress, being ten alternate sections of land on each side of said railroad. Reserving therefrom any right, franchise or privilege of land appertaining thereto, under the Acts of Congress aforesaid, to extend said road, or construct a branch thereof, through a portion of the Indian Territory to Fort Smith."

A foreclosure proceeding having been subsequently instituted by said Union Trust Company, the above mentioned mortgage was subsequently satisfied by means of money raised on bonds issued by the Missouri, Kansas and Texas Railway Company, secured by a first mortgage made by that company to the Central Trust Company of New York, dated June 1, 1890, and a second mortgage of same date to The Mercantile Trust Company upon the above described property among others. The mortgages of June 1, 1890, described the property covered thereby *inter alia*, as follows:

"Second.—Also, all and singular the said line of railroad, constructed and operated from the southern boundary line of the State of Kansas, southerly through the Indian Territory, to the northern boundary line of the State of Texas, to a point at or near the town of Denison, in said State, a distance of two hundred and fifty miles, more or less, and also all the right, title and interest which the Missouri, Kansas and Texas Railway Company has, or might hereafter acquire by reason of having constructed the extension of the said line of railroad through the Indian Territory, in and to any lands granted by the Act of Congress of July 25, 1866, entitled, 'An Act granting lands to the State of Kansas to aid in the construction of the Kansas and

Neosho Valley Railroad and its extension to Red River,' and by any other Act of Congress, or which the said Missouri, Kansas and Texas Railway Company has, or might hereafter acquire under and by virtue of a treaty or treaties from any Indian nation or tribe, or otherwise howsoever, appertaining to the aforesaid extension, together with all the rights, privileges, tenements, hereditaments and appurtenances that may belong or appertain thereto; the land granted under said Acts of Congress being ten alternate sections of land on each side of said railroad."

Further complaining, your oratrix states that there have been issued and are now outstanding the bonds of said Railway Company, issued under and secured by said mortgages, to the amount of sixty million dollars, and which said mortgages and bonds are a lien upon the alternate odd-numbered sections of land on either side of the line of said railway extending through the Indian Territory, to the extent of ten sections on each side thereof, and which said lands were, as aforesaid, granted, in fee simple, *in praesenti*, to the State of Kansas, as trustee for said Railway Company, by the United States of America, subject only to the communal possessory rights of the Cherokee, Creek, Choctaw and Chickasaw Nations or Tribes of Indians under the treaties aforesaid.

Further complaining, your oratrix states that the defendants hereinabove named and described as allottees, and the other allottees herein mentioned, are citizens of the United States of America and reside in the Muskogee or Creek Nation, Indian Territory, and are in possession of that part of the land located in the Muskogee or Creek Nation and so as aforesaid granted to

your oratrix to aid in the building of said railway, and that said lands were so granted as aforesaid to your oratrix in fee simple as trustee for said Railway Company subject only to the communal possessory rights and interests of the Muskogee or Creek Nation or Tribe of Indians under and by virtue of the treaties hereinabove referred to and of the patent of August 11, 1852, and by said Act of Congress of July 25, 1866, the same being all odd numbered sections lying and being situate within twenty miles of the line of said railway as constructed, maintained and operated as aforesaid through the Indian Territory and the Creek Nation, and that the title of the said Muskogee or Creek Nation or Tribe of Indians to said lands under the said treaties and patent aforesaid has been extinguished, and said lands became part of the public lands of the United States so as aforesaid conveyed to your oratrix in fee simple as trustee for said railway company by said Acts of Congress of July 25 and 26, 1866, and your oratrix is now the owner thereof, and entitled to the possession thereof as said trustee for said Railway Company.

Your oratrix further says that the defendants herein, by reason of the facts herein stated cannot be heard to say nor be permitted to claim, but on the contrary are estopped from saying or claiming that the title of the Muskogee or Creek Nation of Indians to said lands has not been extinguished, or that the said lands did not and have not become a part of the public lands of the United States, and passed to and became vested in your oratrix as trustee, under said grants of July 25th and 26th, 1866.

Further complaining, your oratrix states that on July 4, 1884, the Congress of the United States passed an act entitled: "*An Act making appropriation for the current and contingent expenses of the Indian Department and for fulfillment of treaty stipulations with various Indian*

*tribes, for the year ending June 30, 1885, and for other purposes*" (23 Stat., 76), wherein and whereby it is provided that Indians located on public lands might avail themselves of the provisions of the homestead laws as fully and to the same extent as may now be done by citizens of the United States.

Further complaining, your oratrix states that on February 8, 1887, the Congress of the United States passed an act, entitled: "*An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and of Territories over the Indians and for other purposes*" (24 Stat., 388), which act provided a general scheme for the allotment of lands to Indians, but said act did not extend to the allotment of lands occupied by the Cherokees, Creeks, Choctaws, and Chickasaws. And said act further provided that any Indian born within the territorial limits of the United States, to whom allotments should be made, and every Indian born within the territorial limits of the United States, "who has voluntarily taken up within said limits his residence separate and apart from any tribe of Indians therein, is declared to be a citizen of the United States."

Further complaining, your oratrix states that on March 1, 1889, the Congress of the United States passed an act entitled: "*An Act to establish a United States Court in the Indian Territory, and for other purposes*" (25 Stat., 783), which established a United States Court in the Indian Territory, and defines certain crimes and misdemeanors and prescribes punishments therefor.

Further complaining, your oratrix states that on March 1, 1889, the Congress of the United States passed an act accepting the articles of cession by the Muskogee or Creek Nation or Tribe of Indians of the entire western

half of the domain of the said Nation lying west of the division line surveyed and established under the treaty of 1866, and provided that said lands should become a part of the public domain of the United States, and be disposed of according to the laws regulating homestead entries.

Further complaining, your oratrix states that on May 2, 1890, the Congress of the United States passed an act entitled: "*An Act to provide a temporary government for the Territory of Oklahoma, and enlarging the jurisdiction of the United States court in the Indian Territory, and for other purposes*" (26 Stat., 81), which act divided the Indian Territory, as the same then existed, by establishing the Territory of Oklahoma out of the western portion thereof, and as therein defined, and extended over said Oklahoma Territory a body of civil and criminal laws, and being substantially the civil and criminal laws of the State of Nebraska and by Section 29 of said act the remaining part of the Indian Territory, to be thereafter known as the Indian Territory, is specifically defined, and a body of civil and criminal laws was established therein for enforcement in the United States Court as theretofore established, such civil and criminal laws being substantially the civil and criminal laws of Arkansas, as then in force, and by said act the constitution of the United States, and all general laws of the United States which prohibit crimes and misdemeanors, and all laws relating to National banks, were made effective in the Indian Territory as elsewhere in the United States, and by Section 43 of said act, it is provided that any member of any Indian tribe residing in the Territory might apply to the United States Court therein for naturalization and be naturalized as a citizen of the United States.

Further complaining, your oratrix states that by an Act of Congress of February 28, 1891 (26 Stat., 894), it is provided that any Indian entitled to allotment under any existing law may make settlement upon any surveyed or unsurveyed lands of the United States, and upon application to the local land office have the same allotted to him.

Further complaining, your oratrix states that by an Act of Congress of March 3, 1891, appeals from the United States Court in the Indian Territory to the United States Circuit Court of Appeals for the 8th Circuit were provided for.

Further complaining, your oratrix states that by Section 16 of an Act of Congress of March 3, 1893, it was provided that the President of the United States should, by and with the consent and advice of the Senate, appoint three commissioners to enter into negotiations with the Cherokee, Muskogee or Creek, Choctaw, Chickasaw and Seminole Nations of Indians for the purpose of extinguishing the national or tribal title to any lands within that territory then held by any of such nations or tribes, so as to enable the creation of a state or states of the Union, which should embrace the lands within the Indian Territory, and said Act of Congress further provided that the said commission should endeavor to procure, first, such allotment of lands in severality to the Indians as might be agreed upon as just and proper to provide for each Indian a sufficient quantity of land for his or her use, and, second, to procure the cession of such price and upon such terms as might be agreed upon of any lands not found necessary to be so allotted to the Indians, and authorized and directed said Commission to have all of said lands surveyed.

Further complaining, your oratrix states that by Sec-

tion 15 of the same act, the consent of the United States was given to the allotment of the lands of the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles, provided that upon such allotments being made the individual Indians should be deemed in all respects to be citizens of the United States.

Further complaining, your oratrix states that the Commission to the Five Civilized Tribes (popularly known as the "Dawes Commission") has been kept in active existence from the time of its creation under the said Act of Congress of March 3, 1893, to the first of July, 1905, and since such last mentioned date, the work of completing the unfinished business of the Commission to the Five Civilized Tribes has devolved and now devolves upon the Secretary of the Interior, and all powers heretofore granted to the said Commission to the Five Civilized Tribes were on the said first day of July, 1905, and since such time have been and now are conferred upon the said Secretary of the Interior, and the said Secretary of the Interior has appointed the said defendant, Tams Bixby, as Commissioner to the Five Civilized Tribes to aid the said Secretary of the Interior in discharging the duties devolving upon him as successor to the said Commission to the Five Civilized Tribes, as aforesaid.

Further complaining, your oratrix states that the said Commission to the Five Civilized Tribes, by act of June 10, 1896, was authorized to prepare a roll of the citizens of the said Five Civilized Tribes, including freedmen entitled to citizenship in said tribes, and the Commission was authorized to make a report of lands leased in the various nations and the holdings of the members of the various tribes.

Further complaining, your oratrix states that by an Act of Congress of March 1, 1895 (28 Stat., 693), en-

titled: "*An act to provide for the appointment of additional judges of the United States Court in the Indian Territory and for other purposes*," two additional judges were appointed, and additional civil and criminal laws put in force in the Indian Territory.

Further complaining, your oratrix states that by an Act of Congress of April 25, 1896, entitled: "*An Act to grant railroads in the Indian Territory additional powers to secure depot grounds.*" (28 Stat. 109), the Secretary of the Interior was authorized to grant the use of additional lands "held by the Indians in common" as may be necessary for depot purposes.

Further complaining, your oratrix states that by said act of Congress of June 10, 1896, further provision was made for the public surveying of all lands in the Indian Territory, under the general provisions of law then in force relating to surveys of the public lands, and the lands in the Creek or Muskogee Nation have been surveyed as other public lands of the United States.

Further complaining, your oratrix states that the Commission to the Five Civilized Tribes, immediately upon its appointment, began negotiating with the Five Civilized Tribes as in said Acts of Congress provided, but failed for some years to arrive at any agreement with any of said tribes of Indians, as will appear by the annual reports of said Commission for the years 1894, 1895 and 1896, reference to which are hereby made, and in the report of the said Commission for the year 1894 said Commission reported that they found unanimity among the people against the cession of any of the lands to the United States, and the Commission had abandoned all idea of purchasing any of it, and determined to offer them an equal division of all their lands.

Further complaining, your oratrix states that the said

Commission to the Five Civilized Tribes also found and reported in said reports for 1894, that the executory conditions upon which the communal rights of the several Indian tribes were based had not been performed by the Indians, and that said executory conditions were impossible of execution and had ceased to be applicable, and that the various tribes of Indians, including the Creek or Muskogee Tribe, had invited within their borders large numbers of white people who had been adopted as citizens and were participating in the benefits of citizenship, and were holding and using the lands of the said tribes of Indians contrary to the grants thereof to the Indian Nations; and that the said tribes, including the Creek Nation, had sold to the United States one-half of their original territory, to be opened up to white settlement, on their western borders; and a territorial government had been organized in their own territory, and that the stipulations in their title that they should hold their lands for the common and equal use of their citizens had been broken and were not complied with, and that the original idea of a community of property had been entirely lost sight of and disregarded under every branch of the administration of their affairs, and that said lands had been set apart for said tribes in their tribal capacities by conveyances in trust for specific uses clearly indicated in the treaties themselves, and for no other purposes, and that the lands were intended to be held by the tribes for their enjoyment in common, and that the tribes could make no other or different uses thereof, and that they had no power to grant the lands to any one, or an exclusive use of any portion thereof to any one, and that the tribal governments had wholly perverted their high trust; and your oratrix alleges that all of said facts so reported by the said Commission are true.

Further complaining, your oratrix states that in the report of the Commission to the Five Civilized Tribes for the year 1895, it states that it had presented to the Indian Nations every argument to make clear the necessity for a change in the tenure of their tribal property, but the Indians had declined to agree to any such proposed change in the tenure of their lands; and in said report the said Commission further reported that the conditions imposed by the various treaties granting lands to the Indian tribes for their common use no longer obtained, and that a restoration of the treaty status was an impossibility, and declared it to be the imperative duty of Congress to assume at once political control in the Indian Territory, and recommended territorial government adapted to their condition and so framed as to secure to the Indians and others their vested rights, and that a United States Court be created in the Indian Territory, and that the complicated question in which the tenure of their lands was involved be left to the courts for adjudication.

Further complaining, your oratrix states that in the report of the Commission to the Five Civilized Tribes for the year 1896, the said Commission said that there was a growing desire among the Indians for a change from their present condition, both in respect to the tenure and use of their tribal property and in the manner in which their government was being conducted, but that this desire was not universal, and many were unwilling to consent to any modification in their tribal holdings of the land, and that during all of said negotiations, and in the agreements reached and hereafter referred to, the Indians only agreed to a change in their tribal title and to accept allotment upon condition that the United States would cause a new patent to be issued to each

allottee, conveying all claims whatsoever to each allotment, and relinquishing all of its rights of reversion and remainder in and to said lands, notwithstanding such estate of reversion and remainder had already been granted to your oratrix for said Missouri, Kansas & Texas Railway Company by the acts of July 25 and 26, 1866, as hereinbefore and hereinafter stated.

Further complaining, your oratrix states that in the negotiations with the Commission to the Five Civilized Tribes, the Indian Tribes also claimed that it was no part of the common or communal system then in vogue or practice to give or secure to any citizen full control over any particular part of the common domain, because all persons had equal rights in and to the whole of the lands and every part and parcel thereof, as will appear from the report of said Commission for the year 1897, page 40, to which reference is hereby made, and that so far as allotment of the domain was concerned, a complete and simple system of allotment had been in effect without any change in their title or tenure to the lands, which system consisted in securing to each citizen so much of the domain as he could cultivate, the land itself remaining the common property of the tribes. And in said report of the Commission to the five civilized tribes for the year 1897, the fact that an agreement had been reached with the Creek Tribe of Indians was duly reported, but the said Commission further reported that it had failed of ratification by the National Council of the Muskogee or Creek Nation, and that the work of the Commission had reached a stage requiring serious consideration in respect to new legislation, and that a change in the tenure of the tribal property of the Indians had become an imperative and inevitable necessity, and that one serious objection to the scheme of allotment

was the rights of the said Missouri, Kansas & Texas Railway Company under the acts of July 25 and 26, 1866, granting to said company the lands hereinbefore specified, and that the said Missouri, Kansas & Texas Railway Company was resisting the proposed allotment to the utmost of its power, and had, through counsel, with great earnestness, first to the Commission, next to the Secretary of the Interior, and then to the President, presented its claims and demands.

Further complaining, your oratrix states that on June 28, 1898, the Congress of the United States passed an act entitled: "*An Act for the protection of the people of the Indian Territory and for other purposes*," (30 Stat., 495), commonly known as the "Curtis Act," and as such hereafter referred to. By this act additional civil and criminal laws were put in force in the Indian Territory, and it is provided in Section 11 of said Act that when the roll of citizens of any of such nations or tribes is completed, and the survey of the lands also completed, the Commission to the five civilized tribes should proceed to allot the exclusive use and occupancy of the surface of all the lands of said tribe or nation susceptible of allotment among the citizens thereof, as shown by said roll, and reserved and set apart certain lands for town sites, churches, schools and burying grounds, and further provided that nothing therein contained should in any way affect any vested legal rights which had been theretofore granted by Act of Congress. This act further ratified agreements which had been entered into between the Choctaw and Chickasaw Tribes of Indians and the Muskogee or Creek Tribe of Indians, with the Commission to the Five Civilized Tribes, pursuant to the terms of the statutes hereinabove referred to. Under the authority of Section 11 of the "Curtis Act," said

Commission opened a land office in the Muskogee or Creek Nation and began the work of allotment, as therein provided. The Creek agreement of 1897, as amended by this act, also failed of ratification by the Muskogee or Creek Nation, and never became effective.

Further complaining, your oratrix states that by Section 28 of the "Curtis Act," all tribal courts in the Indian Territory were abolished and all civil and criminal cases then pending were transferred to the United States Court, and all tribal laws were abolished and declared non-enforceable in said United States Courts.

Further complaining, your oratrix states that the said Missouri, Kansas & Texas Railway Company protested against the passage of all of the aforesaid acts and agreements which in any way interfered with or disturbed or sought to change or affect its right, title and interest to the land so as aforesaid conveyed to your oratrix for it, and also appeared before the Commission to the Five Civilized Tribes and the representatives of the several Indian Nations, in their negotiations for treaties and agreements under the said Acts of Congress and likewise protested against any agreement or act which would in any way interfere with or disturb its vested rights in and to the said lands, and the said Missouri, Kansas & Texas Railway Company, on September 24, 1897, submitted to the Commission to the Five Civilized Tribes and the representatives of the Muskogee or Creek Nation a paper, setting forth its rights in and to the said lands, so as aforesaid granted to your oratrix for it in the Muskogee or Creek Nation, which said paper and propositions were in words and figures as follows, to-wit:

"PROPOSITIONS SUBMITTED BY THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY TO THE JOINT COMMISSIONS OF THE UNITED STATES AND CREEK NATION.

Muskogee, Sept. 24, 1897.

"The Missouri, Kansas & Texas Railway Company (formerly Union Pacific Railway Company, Southern branch), has been built, operated and maintained through the Indian Territory under the authority of the Act of Congress of July 25, 1866, entitled 'An Act granting lands to the State of Kansas to aid in the construction of the Kansas & Neosho Valley Railroad and its extensions to Red River.' See pamphlet 'Laws and Executive Documents' herewith submitted, pages 13 to 19 inclusive.

"By Section 9 of that Act it was provided that should the Union Pacific Railway Company, Southern branch (now Missouri, Kansas & Texas Railway Company), first complete its road to the Southern boundary line of Kansas, the Northern boundary line of the Indian Territory, then it should be authorized upon obtaining the written consent of the President of the United States to build, maintain and operate its road through the Indian Territory.

"About the beginning of 1870 a controversy arose between the contending railroad companies as to which had acquired the right to build across the Territory, which was settled in favor of the Missouri, Kansas & Texas Railway Company, by the decisions of the Secretary of the Interior of May 21, 1870, approved by President Grant, May 23, 1870, and of July 12, 1870, approved by the President July 20, 1870. See pamphlet, pages 25 to 40 and pages 41 to 48.

"On July 22, 1870, official notice by the Secretary of the Interior was given to the said Railway Company that it was authorized to build, and contained

the requirements with which it should comply, also directed the map of its route to be filed with the Secretary of the Interior, and that a bond be given to the United States for the completion of road in conformity to the specified standard. See phamplet, pages 49 and 50.

"Subsequently the road was built, Commissioners were appointed by the President to examine the same, and their reports made, finding that the road had been built according to specifications, and recommending its acceptance. (See pamphlet, pages 54 to 64 and pages 64 to 77).

"There were two of these reports, the first covering the road from the Southern boundary of the State of Kansas to the Arkansas River, and the other from the Arkansas River to Red River, the first dated December 21, 1871, and approved by the President May 17, 1872, the second dated January 13, 1873, and approved March 11, 1873.

"By Sections 6 and 8 of said Act of Congress of July 25, 1866, reading them together, the right-of-way was granted to the said railway through the Territory, to the extent of one hundred feet in width on each side of the road; also all necessary ground for station buildings, workshops, depots, machine shops, switches, sidetracks, turntables and water stations, together with the right to take from adjacent lands material for the construction of the road.

"By the fifth Article of the treaty between the United States and the Creek Nation, proclaimed August 11th, 1866, the right-of-way was granted through the lands of the Creek Nation to the railroad company authorized by Congress to construct a railroad from north to south through that Nation.

"The right-of-way of the said Railway Company through the Indian Territory is clearly two hundred feet in width, one hundred feet on each side of the road, and is shown in the map filed with the Secre-

tary of the Interior. The station grounds of the railway are shown on maps and filings of record in the office of the Secretary of the Interior. These rights as we claim them have been generally recognized, and the position of the Railway Company is that no treaty which may be made should contain anything which will interfere with its rights-of-way and station grounds thus solemnly conferred by Congress.

"On the contrary, the Railway Company submits that a provision should be inserted substantially of the following purport:

'That all rights-of-way granted to railroad corporations whose lines have heretofore been constructed, and at the time of the taking effect of this treaty are being operated, and those granted by Act of Congress which are now in the course of construction or are hereafter constructed, as provided in the Act or Acts of Congress granting the right, together with such lands as they were or are authorized to take or acquire for depots or station grounds, sidings, and freight or storage purposes, are hereby confirmed.'

"We submit that there should be a further provision in the treaty to the effect that the railway companies shall be permitted to retain any side, spur, extension or branch tracks which they may have constructed, acquired or leased as feeders to their main lines on paying to the Nation the reasonable values of their interest in the lands, the right-of-way therefor not to exceed one hundred feet, and the compensation to be paid for such right-of-way, if not agreed upon by the parties, to be determined by a suit to be instituted by either party in the United States Court for the Indian Territory.

"Land Grant.

"The Railway Company acquired its land grant in the Indian Territory under the said Act of Congress

of July 25, 1866. (Pamphlet, pages 13 to 19. See specially Sections 1 and 9). There is no question but the Company has complied with all the conditions of the grant. It has built, maintained and operated its railway through the Indian Territory as required by the Act and the conditions prescribed by the President. The Company's contention is that at the time of the grant the United States held the title to the lands in the Indian Territory, subject to the right of occupancy by the Indian Nations in their communal capacity, and the grant to the Company was of the estate in remainder.

"The treaty should contain a provision to the effect that the allotments provided for shall not impair any rights heretofore granted by Congress.

"We suggest the following provision:

'Whereas, the Missouri, Kansas & Texas Railway Company claims an interest in the lands in the Creek Nation under the Act of Congress of the United States of July 25, 1866, which is not conceded by said Nation; therefore, the said lands are withheld for the present from the allotment herein provided for, but such reservation is not to be construed as a concession in any way on the part of the parties hereto or either of them, that the said Railway Company has any interest in such lands. And provided further that said lands may be sold under the direction of the United States, and the proceeds held for the Creek Nation or the said Railway Company, one or both, to be paid to whichever of said parties it shall be ultimately determined said proceeds belong, and such determination may be had either by mutual agreement between the Creek Nation and said Railway Company or by some court to whose decisions the matter may be committed by joint agreement of the Creek Nation and said Railway Company, or by an Act of the Congress of the United States.'

"Respecting coal and mineral lands, we would say that it is our understanding that there is a prevail-

ing sentiment among the Creeks that the coal and minerals should go with the lands and not be reserved to the Nation. This Company would be satisfied with such disposition of this question. If, however, it should be determined that the coal and mineral lands are to be reserved, then we submit that provision should be made by which the royalty exacted will be reasonable, and such as to permit competition, and further that the royalty required to be paid may be flexible, providing that the same be reduced in some proper proportion to the per diem tonnage. To illustrate our views, if a coal mine produces an average of 1,000 tons per day the royalty paid for a less tonnage may be reduced in some given proportion."

Further complaining, your oratrix states that on October 8, 1897, the Principal Chief of the Muskogee or Creek Nation or Tribe of Indians transmitted to the National Council of said Nation the agreement which had been entered into between the Commission to the Five Civilized Tribes and the Commissioners on behalf of the Muskogee or Creek Nation, and so as aforesaid ratified by the "Curtis Act," together with the report of the Commission to the council, as appears from the annual report of the Commission to the Five Civilized Tribes for the year 1897, pages 61-63, and in the report of the Commission representing the Muskogee or Creek Nation the protest and paper so as aforesaid filed by the said Missouri, Kansas & Texas Railway Company is referred to and submitted to the National Council, and by act of the National Council of the Muskogee or Creek Nation of October 18, 1897, the said Creek agreement was rejected and disapproved, and by the resolution of the said National Council of the Muskogee or Creek Nation

of November 3, 1897, the reasons therefor are set forth and declared, as will appear from said report of the Commission to the Five Civilized Tribes, page 69. And your oratrix says that from all of said proceedings, agreements and acts it distinctly and clearly appears that both the Commission to the Five Civilized Tribes and the Muskogee or Creek Nation or Tribe of Indians fully understood the said railway company's position and claim and rights and estate in and to the lands so conveyed to your oratrix, as trustee for said Railway Company, by the Acts of Congress of July 25 and 26, 1866.

Further complaining, your oratrix states that on March 1, 1901, the Congress of the United States passed an act entitled: "*An Act to ratify and confirm the agreement with the Muskogee or Creek Tribe of Indians and for other purposes*" (31 Stat., 861). By this act it was provided that all lands of the said tribe should be allotted among the citizens of the tribe, so as to give each an equal share of the whole, and further provided that all allotments which had been made to Creek citizens by the Commission to the Five Civilized Tribes under the terms of the Curtis Act, and as to which there was no contest pending, were confirmed; and further provided that the Commission to the Five Civilized Tribes should continue the work of allotting the Creek lands. Certain lands by this act were set aside for townsites and to be sold to any and all citizens of the United States as therein provided. Other lands were set aside for certain schools and others to certain churches, and by section 24 thereof all lands to which, at the date of the ratification of this agreement, any railroad company, under any treaty or Act of Congress shall have a vested right for right-of-way, depots, station houses, water sta-

tions, stock yards or similar uses connected with the maintenance and operation of a railroad, were reserved from allotment. Section 23 of said agreement, which was ratified by said Act of Congress, reads as follows:

"Immediately after the ratification of this agreement by Congress and the tribe, the Secretary of the Interior shall furnish the principal chief with blank deeds necessary for all conveyances herein provided for, and the principal chief shall thereupon proceed to execute in due form and deliver to each citizen who has selected or may hereafter select his allotment, which is not contested, a deed conveying to him all right, title and interest of the Creek Nation and of all other citizens in and to the lands embraced in his allotment certificate, and such other lands as may have been selected by him for equalization of his allotment.

"The principal chief shall, in like manner and with like effect, execute and deliver to proper parties deeds of conveyance in all other cases herein provided for. All lands or town lots to be conveyed to any person shall, so far as practicable, be included in one deed, and all deeds shall be executed free of charge.

"All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title and interest of the United States in and to the lands embraced in his deed.

"Any allottee accepting such deed shall be deemed to assent to the allotment and conveyance of all the lands of the tribe, as provided herein, and as a relinquishment of all his right, title and interest in and to the same, except in the proceeds of lands reserved from allotment.

"The acceptance of deeds of minors and imcompetents, by persons authorized to select their allot-

ments for them, shall be deemed sufficient to bind such minors and incompetents to allotment and conveyance of all other lands of the tribe, as provided herein.

"The transfer of the title of the Creek Tribe to individual allottees and to other persons, as provided in this agreement, shall not inure to the benefit of any railroad company, nor vest in any railroad company, any right, title, or interest in or to any of the lands in the Creek Nation.

"All deeds when so executed and approved shall be filed in the office of the Dawes Commission, and there recorded without expense to the grantee, and such records shall have like effect as other public records."

The agreement with the Creeks approved March 1, 1901, contained the following provision: —

"3. All lands of said tribe, except as herein provided, shall be allotted among the citizens of the tribe by said Commission so as to give each an equal share of the whole in value as nearly as may be, in manner following: There shall be allotted to each citizen one hundred and sixty acres of land — boundaries to conform to the Government survey — which may be selected by him so as to include improvements which belong to him. One hundred and sixty acres of land valued at six dollars and fifty cents per acre, shall constitute the standard value of an allotment, and shall be the measure for the equalization of values; and any allottee receiving lands of less than such standard value may, at any time, select other lands which at their appraised value, are sufficient to make his allotment equal in value to the standard so fixed.

* * * * * * * * * *

"9. When allotment of one hundred and sixty acres has been made to each citizen, and the residue of lands,

not herein reserved or otherwise disposed of, and all the funds arising under this agreement shall be used for the purpose of equalizing allotments, and if the same be insufficient therefor the deficiency shall be supplied out of any other funds of the tribe, so that the allotments of all citizens may be made equal in value, as nearly as may be, in manner herein provided."

This provision was repealed by the appropriation act of April 21, 1904, in the following language: —

> • • • "And provided further, That the Secretary of the Interior is hereby granted authority to sell at public sale in tracts not exceeding one hundred and sixty acres to any one purchaser, under rules and regulations to be made by the Secretary of the Interior, the residue of land in the Ceeek Nation belonging to the Creek tribe of Indians, consisting of about five hundred thousand acres, and being the residue of lands left over after allotments of one hundred and sixty acres to each of said tribe." • • •

The following clause was inserted in the Indian appropriation act of March 3, 1905, for the purpose of repealing the law last above quoted and restoring the provision of the Creek agreement of March 1, 1901 :—

> "That the provision in the Indian appropriation bill for the fiscal year ending June thirtieth, nineteen hundred and four, authorizing the Secretary of the Interior to sell the residue of the lands of the Creek Nation not taken as allotments, is hereby repealed and the provision of the Creek agreement, Article III, approved March first, nineteen hundred and one, is hereby restored and re-enacted."

Section 16 of the supplemental agreement with the Creek Nation, ratified by the Act of June 30, 1902 (32 Stat. L. 500), provides as follows: —

"Lands allotted to citizens shall not in any manner whatever be incumbered or sold to secure or satisfy any debt or obligation, nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead in which this condition shall appear."

There are two general provisions of law in reference to the alienation or sale of allotments by individual Indians, which apply to the Five Civilized Tribes (including the Creek or Muskogee Nation), in addition to the agreements with each of the nations in regard to such sales by citizens of the respective tribes.

The first of these general provisions contained in the act of March 3, 1903, is as follows: —

"And provided further that nothing herein contained shall prevent the surveying and platting at their own expense of town sites by private parties where stations are located along the lines of railroads, nor the unrestricted alienation of lands for such purposes when recommended by the Commission to the Five Civilized Tribes and approved by the Secretary of the Interior."

The second general provision in regard to alienation of allotments is contained in the act of April 21, 1904 (33 Stat. L. 189) as follows: —

* * * "And all the restrictions upon the alienation of lands of all allottees of either of the Five

Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to the homesteads, removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors and except as to homesteads, may with the approval of the Secretary of the Interior, be removed, under such rules and regulations as the Secretary of the Interior may prescribe, upon application to the United States Indian agent at Union Agency, in charge of the Five Civilized Tribes, if said agent is satisfied, upon a full investigation of each individual case, that such removal of restrictions is for the best interest of said allottee. The finding of the United States Indian agent and the approval of the Secretary of the Interior shall be in writing and shall be recorded in the same manner as patents for lands are recorded."

Further complaining, your oratrix states that Section 46 of said agreement so ratified by said Act of March 1st, 1901, provides that the tribal government of the Muskogee or Creek Nation should not continue longer than March 4th, 1906, subject to such further legislation as Congress might deem proper.

That Congress, by Joint Resolution, approved March 2, 1906, has provided as follows: —

"That the tribal existence and present tribal gov-
"ernments of the Choctaw, Chickasaw, Cherokee,
"Creek and Seminole tribes or nations of Indians in
"the Indian Territory are hereby continued in full
"force and effect for all purposes under existing laws
"until all property of such tribes, or the proceeds
"thereof shall be distributed among the individual
"members of said tribes unless hereafter otherwise
"provided by law."

And by Act approved April , 1906, entitled

"*An Act to provide for the final disposition of the affairs*
"*of the Five Civilized Tribes in the Indian Territory, and*

"*for other purposes*"
in Section 27 and 28, it is provided as follows: —

> "Sec. 27. That the lands belonging to the Choc-
> "taw, Chickasaw, Cherokee, Creek or Seminole
> "tribes, upon the dissolution of said tribes, shall not
> "become public lands nor property of the United
> "States, but shall be held in trust by the United
> "States for the use and benefit of the Indians respect-
> "ively comprising each of said tribes, and their heirs
> "as the same shall appear by the rolls as finally con-
> "cluded as heretofore and hereinafter provided for:
> "Provided, That nothing herein contained shall
> "interfere with any allotments heretofore or here-
> "after made or be made under the provisions of this
> "or any other Act of Congress."

> "Sec. 28. That the tribal existence and tribal re-
> "lations and government of the Choctaw, Chickasaw,
> "Cherokee, Creek, and Seminole tribes or nations are
> "hereby continued in full force and effect for all
> "purposes until the fourth day of March, *anno*
> "*Domini* nineteen hundred and seven; and all Acts
> "and parts of Acts, so far as they conflict herewith,
> "are hereby repealed."

But your oratrix avers that prior to the adoption of said Joint Resolution and the said Act of Congress, the Indian or tribal title of the Creek Nation in and to the lands herein described and claimed by your oratrix had been extinguished and the said Creek Nation had ceased to occupy or claim the same as a tribe or Nation, and said lands had been sought to be allotted in severalty to certain individual members of said Nation, as citizens of the United States, in the manner herein set forth, notwithstanding the same had been granted to and vested in your oratrix under the said land grants of July 25th and 26th, 1866.

**Further complaining, your oratrix states that on June 30, 1902, the Congress of the United States passed an act**

entitled: "*An Act to ratify and confirm the supplemental agreement with the Creek Tribe of Indians and for other purposes*," which agreement and act was also ratified by the Muskogee or Creek Council July 26, 1902, and proclaimed in effect August 8, 1902, by the President of the United States.

Further complaining, your oratrix states that under the "Curtis Act" and the two Creek agreements, so ratified by acts of Congress as aforesaid, the Commission to the Five Civilized Tribes has undertaken to allot practically all of the Creek lands, so as aforesaid granted to your oratrix as trustee for said railway company, to Creek Indians and freedmen, except such lands as were reserved for townsites and other purposes, and which are being disposed of under general laws of the United States; and, as appears from the annual report of the Commission to the Five Civilized Tribes for the year ending June 30, 1903, the record work preparatory to the issuance of patents to the citizens of the Muskogee or Creek Nation under the provisions of the above acts and agreements, had been practically completed, and the deeds were being delivered to the various allottees, as provided for in said acts and agreements, and in said report the Commission to the Five Civilized Tribes says that such deeds, when prepared, are transmitted to the Principal Chief, the instrument is returned to the Commission, and then sent to the Secretary of the Interior for his signature. This being done, the deed is certified by the Commission and transmitted to the principal chief for delivery to the allottees, and is recorded in the office of the Commission to the Five Civilized Tribes.

Further complaining, your oratrix states that the following are copies of the forms of the homestead deeds,

of allotment deeds and deeds to heirs which have been and which are being executed and delivered to the allottees under said agreements and acts of Congress in the Muskogee or Creek Nation:

"HOMESTEAD DEED. .....Roll No.....

THE MUSKOGEE (CREEK) NATION.

Indian Territory.

" *To All Whom These Presents Shall Come, Greeting:*

" WHEREAS, By the Act of Congress approved March 1, 1901, (31 Stats. 861), agreement ratified by the Creek Nation May 25, 1901, it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as therein provided, should be allotted among the citizens of said tribe by the United States Commission to the Five Civilized Tribes so as to give to each an equal share of the whole in value, as nearly as may be, and

" WHEREAS, It was provided by said Act of Congress that each citizen shall select, or have selected for him, from his allotment forty acres of land as a homestead for which he shall have a separate deed, and

" WHEREAS, The said Commission to the Five Civilized Tribes has certified that the land hereinafter described has been selected by or on behalf of..... a citizen of said tribe, as a homestead,

" NOW, THEREFORE, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Act of the Congress of the United States, have granted and conveyed and by these presents do grant and convey unto the said..... all right, title and interest of the Muskogee (Creek) Nation and of all other citizens of said Nation in and to the following described land, viz:.....

.....

of the Indian Base and Meridian, in Indian Territory, containing.....acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the conditions provided by said Act of Congress and which conditions are that said land shall be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years; and subject, also, to provisions of said Act of Congress relating to the use, devise and descent of said land after the death of the said ..... and subject, also, to all provisions of said Act of Congress relating to appraisement and valuation and to the provisions of the Act of Congress approved June 30, 1902, (Public No. 200).

"In Witness Whereof, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Great Seal of said Nation to be affixed this.....day of..... A. D., 190....

....,

Principal Chief of the Muskogee (Creek) Nation.

Department of the Interior,

Approved....., 190....

.....

Secretary."

"Allotment Deed. .....Roll No.....

The Muskogee (Creek) Nation.

Indian Territory.

"*To All Whom These Presents Shall Come, Greeting:*

"Whereas, By the Act of Congress approved March 1, 1901, (31 Stats., 861), agreement ratified by the Creek Nation May 25, 1901, it was provided

that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as therein provided, should be allotted among the citizens of said tribe by the United States Commission to the Five Civilized Tribes so as to give to each an equal share of the whole in value, as nearly as may be, and

"WHEREAS, It was provided by said Act of Congress that each citizen shall select, or have selected for him, from his allotment forty acres of land as a homestead for which he shall have a separate deed, and

"WHEREAS, The said Commission to the Five Civilized Tribes has certified that the land hereinafter described has been selected by or on behalf of..... .....a citizen of said tribe, as an allotment, exclusive of a forty-acre homestead, as aforesaid,

"NOW, THEREFORE, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Act of the Congress of the United States have granted and conveyed and by these presents do grant and convey unto the said..... all right, title and interest of the Muskogee (Creek) Nation and of all other citizens of said Nation in and to the following described land, viz:..... ..... of the Indian Base and Meridian, in Indian Territory, containing.....acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to all provisions of said Act of Congress relating to appraisement and valuation and to the provisions of the Act of Congress approved June 30, 1902 (Public No. 200).

"IN WITNESS WHEREOF, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Great Seal of said Nation to

be affixed this.....day of....., A. D. 190....

.....,

Principal Chief of the Muskogee (Creek) Nation.

Department of the Interior,

Approved....., 190....

.....
Secretary."

"HOMESTEAD DEED TO HEIRS. ....Roll No....

THE MUSKOGEE (CREEK) NATION.

Indian Territory.

" *To All Whom these Presents Shall Come, Greeting:*

" WHEREAS, By the Act of Congress approved March 1, 1901 (31 Stat., 861), agreement ratified by the Creek Nation May 25, 1901, it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as therein provided, should be allotted among the citizens of said tribe by the United States Commission to the Five Civilized Tribes so as to give each an equal share of the whole in value, as nearly as may be; and

" WHEREAS, It was provided by said Act of Congress that each citizen shall select, or have selected for him, from his allotment of forty acres of land as a homestead for which he shall have a separate deed; and

" WHEREAS, It was provided by the Act of Congress approved June 30, 1902 (32 Stat., 500), that the homestead of each citizen shall descend to his heirs or be disposed of as therein provided; and

"WHEREAS, The Commission to the Five Civilized Tribes has found that....., a citizen of said tribe, is now dead, and said Commission has certified that the land hereinafter described has been selected as a homestead for said ....., and that said land has been allotted to the heirs of said..... .....:

"Now, THEREFORE, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Acts of the Congress of the United States, have granted and conveyed, and by these presents do grant and convey, unto the heirs of the said ....., deceased, all right, title, and interest of the Muskogee (Creek) Nation and of all other citizens of said nation in and to the following described land, viz:..... ..... of the Indian base and meridian, in Indian Territory, containing.....acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the provisions of said Acts of Congress.

"In WITNESS WHEREOF, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Great Seal of said nation to be affixed this.....day of....., A. D. 190....

....,

Principal Chief of the Muskogee (Creek) Nation.

Department of the Interior,

Approved....., 190....

....,

Secretary.

By....,

Clerk."

"ALLOTMENT DEED TO HEIRS. .....Roll No.....

THE MUSKOGEE (CREEK) NATION.

Indian Territory.

" *To All Whom These Presents Shall Come, Greeting:*

" WHEREAS, By the Act of Congress approved March 1, 1901 (31 Stat., 861), agreement ratified by the Creek Nation May 25, 1901, it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as herein provided, should be allotted among the citizens of said tribe by the United States Commission to the Five Civilized Tribes so as to give to each an equal share of the whole in value, as nearly as may be; and

" WHEREAS, It was provided by said act of Congress that if a citizen of said tribe has died before receiving his allotment of lands, the lands to which he would be entitled, if living, shall descend to his heirs and be allotted and distributed to them; and

" WHEREAS, The Commission to the Five Civilized Tribes has found that....., a citizen of said tribe, is now dead, and said Commission has certified that the land hereinafter described has been allotted to the heirs of the said .....:

" NOW, THEREFORE, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Act of Congress of the United States, have granted and conveyed, and by these presents do grant and convey, unto the said heirs of..... ....., deceased, all right, title, and interest of the Muskogee (Creek) Nation and of all other citizens of said nation in and to the following described land, viz:.....
.....

of the Indian base and meridian, in Indian Territory, containing.....acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the provisions of said Act of Congress and to the provisions of the Act of Congress approved June 30, 1902 (32 Stat., 500).

"IN WITNESS WHEREOF, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Great Seal of said nation to be affixed this.....day of....., A. D. 190....

....,

Principal Chief of the Muskogee (Creek) Nation.

Department of the Interior,

.....

Approved....., 190....

....,

Secretary.

By....,

Clerk."

Further complaining, your oratrix states that by an Act of Congress entitled: "*An Act to amend section 6, Chapter 119, United States statutes at large No. 24,* approved March 3, 1901, every Indian in the Indian Territory is declared to be a citizen of the United States, and entitled to all the rights, privileges and immunities of such citizens. (31 Stat., 1447.)

Further complaining, your oratrix states that the Secretary of the Interior on July 10, 1903 prescribed certain rules and regulations under which individual Creek allottees might sell certain of their allotted lands,

not exceeding one hundred and twenty acres of each allotment, as provided in said Acts of Congress.

Further complaining, your oratrix states that the said Missouri, Kansas & Texas Railway Company, immediately upon the opening of the land office at Muskogee, Creek Nation, Indian Territory, on the 1st day of April, 1899, and before any individual Creek citizen had indicated in any way to said Commission, and before said Commission had indicated in any way the particular land which was to constitute the allotment of any Creek citizen, had served upon the members of the said Commission, and each of them, who were then in the Indian Territory, to-wit: The Honorable Tams Bixby, acting chairman of the Commission to the Five Civilized Tribes; the Honorable Archibald S. McKennon and the Honorable Thomas B. Needles, a notice of its right and title to every alternate section of land, or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of its railway through the Indian Territory, and of which notice the following is a copy:

"*To the Honorables*:

Henry L. Dawes, Chairman;
Tams Bixby, Acting Chairman;
Archibald S. McKennon,
Thomas B. Needles,

Members of the Commission to the Five Civilized Tribes, and to the Officers, in charge of the office established by the said Commission at the town of Muskogee, in the Creek Nation, and Indian Territory for the purpose of registering each and every selection of land made by any member of the said Creek Tribe or Nation for his allotment, in accordance with the rules and regulations governing the selection and renting of prospective allotments

of lands in the Indian Territory, prescribed by the Secretary of the Interior under the provisions of the Act of Congress approved June 28th, 1898, which said rules and regulations are dated at Washington, D. C., October 7th, 1898, and under which citizens of the Creek Nation and Creek Freedmen may each select one hundred and sixty acres of land from the Creek domain as a preliminary allotment as provided in the notice of said Commissioners dated at Muskogee, Indian Territory, March 6th, 1899:

"You and each of you are hereby notified that the Missouri, Kansas & Texas Railway Company, a corporation incorporated and organized under and by virtue of the laws of the State of Kansas, claims every alternate section of land, or parts thereof, designated by odd numbers to the extent of ten sections per mile on each side of its line of railroad through the Creek Nation, within twenty miles from the line of said road, and in case it shall appear that the United States had at the time when the line of said road was definitely located, sold any of said sections, or any part thereof, or that the right of pre-emption or homestead settlement had attached to the same, or that the same had been reserved by the United States for any purpose whatever, then the said Missouri, Kansas & Texas Railway Company claims from the lands nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States has sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption had attached, and that said claim is based upon an Act of Congress, entitled, 'An Act granting lands to the State of Kansas to aid in the construction of the Kansas and Neosho Valley Railroad, and its Extension to Red River,' approved July 25th, 1866, and published in volume fourteen of the United States Statutes at Large, pages two hundred and thirty-six to two hundred and thirty-nine,

inclusive, and sections one, eight, nine and eleven, of which said act are as follows:

'Section 1.

'Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That for the purpose of aiding the Kansas and Neosho Valley Railroad Company, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from the eastern terminus of the Union Pacific Railroad, Eastern Division, at the line between Kansas and Missouri, at or near the mouth of the Kansas River, on the south side thereof, southwardly, through the eastern tier of counties in Kansas, with a view of its extension, so as to effect a junction at Red River with a railroad now being constructed from Galveston to Red River at or near Preston, in Texas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company, every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of said road, to be selected within twenty miles from (of) the line of said road; but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section or any part thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secre-

tary of the Interior, shall be reserved and held for the State of Kansas for the use of said company by the said Secretary for the purpose of the construction and operation of said railroad, as provided by this act; Provided, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way two hundred feet in width is hereby granted, subject to the approval of the President of the United States; and provided further, That none of the lands hereby granted shall be selected beyond twenty miles from the said road.

'Section 8.

'And be it further enacted, That said Kansas and Neosho Valley Railroad Company, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas south, through the Indian Territory, to Red River, at or near Preston, in the State of Texas, so as to connect with the railway now being constructed from Galveston to a point at or near Preston, in said State; and the right of way through the Indian Territory, wherever such right is now reserved, or may hereafter be reserved to the United States by treaty with the Indian tribes, is hereby granted to said company, to the same extent as granted by sixth section of this act through the public lands; and in all cases where the right of way as aforesaid, through the Indian lands, shall not be reserved to the Government, the said company shall, before constructing its road, procure the consent of the tribe or tribes interested, which consent, with all its terms and conditions,

shall be previously approved and indorsed by the President and filed with the Secretary of the Interior.

'Section 9.

'And be it further enacted, That the same grants of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: Provided, That said lands become a part of the public lands of the United States.

'Sec. 11.

'And be it further enacted, That any railroad company chartered under any law of the United States, or of the State of Kansas, which may have been heretofore or shall hereafter be recognized and subsidized by any act of the Congress of the United States, may connect, unite, and consolidate with this railroad company, after the same shall be located to the valley of the Neosho River, upon just, fair, and equitable terms, to be agreed upon between the parties, and shall not be against the public interest or the interest of the United States; nor shall any road authorized to connect as aforesaid charge the road so connecting a greater tariff per mile for freight or passengers than is charged for the same per mile by its own road: And provided further, That should the Leavenworth, Lawrence and Fort Gibson Railroad Company, or the Union Pacific Railroad Company, southern branch, construct and complete its road to that point on the southern boundary of the State of Kansas where the line of said Kansas and Neosho Valley Railroad shall cross the same, before the said Kansas and Neosho Valley Railroad Company shall have constructed and completed its said road to said point, then and in that event the company so first reaching

in completion the said point on the southern boundary of the State of Kansas, shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas, with grants of land according to the provisions of this act, but upon the further special condition, nevertheless, that said railroad company shall have commenced in good faith the construction thereof before the said Kansas and Neosho Valley Railroad Company shall have completed its said railroad to said point: And provided further, That said other railroad company so having commenced said work in good faith, shall continue to prosecute the same with sufficient energy to insure the completion of the same within a reasonable time, subject to the approval of the President of the United States: And provided further, That the right of way through private property when not otherwise provided for in this act, or by the law of any State through which the road may pass, shall be obtained by the said Kansas and Neosho Valley Railroad Company, or either of the other companies named in this act, in accordance with the provisions of section three of an act to amend an act entitled "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," Approved July first, eighteen hundred and sixty-two.'

"Said Missouri, Kansas and Texas Railway Company further respectfully shows that it is the same corporation mentioned in section eleven of said Act of Congress hereinabove quoted as 'Union Pacific Railroad Company, Southern Branch,' its corporate name having since been changed to 'Missouri, Kansas and Texas Railway Company,' and that it, in accordance with the provisions of said Act of Congress, and said section eleven thereof, obtained the

written approval of the President of the United States to construct and operate its line of railroad from the point on the southern boundary of the State of Kansas, indicated in said act, to the point at or near Preston, in the State of Texas, also indicated in said act, and has since the construction of its line of railroad between said points, in accordance with the said approval of the President of the United States, operated its said line of railroad between said points, in accordance with said approval of the President of the United States, and said Act of Congress hereinabove referred to.

"And said Missouri, Kansas and Texas Railway Company respectfully demands that the sections of land hereinabove referred to as being claimed by the said Missouri, Kansas and Texas Railway Company in accordance with the provisions of said Act of Congress approved July 25th, 1866, and hereinabove mentioned, be allotted to the Missouri, Kansas and Texas Railway Company, and that neither any of said sections nor any parts thereof be allotted to any other person whomsoever and that you do not register any selection of any lands covered by any of the sections hereinabove shown to be claimed by said Missouri, Kansas and Texas Railway Company, made by any member of said Creek Nation or Tribe, for his allotment, and that you do not receive any application from any member of said Tribe or Nation in which is described any land hereinabove shown to be claimed by said Missouri, Kansas and Texas Railway Company.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,

By JAMES HAGERMAN AND
CLIFFORD L. JACKSON,

*Its Attorneys.*

Muskogee, Indian Territory,

April the first, 1899, eight o'clock A. M."

Further complaining, your oratrix states that the said Missouri, Kansas & Texas Railway Company, on the 3rd and 8th days of January, 1903, respectively, also served upon the members of the townsite commission in the Muskogee or Creek Nation, who were authorized to plat and dispose of lands and townsites, as provided in said acts of Congress, notices, of which the following is a copy:

"*To the Honorables*:

Dwight W. Tuttle,
Henry C. Linn,
George A. Alexander,
*Members of the Townsite Commission for the Creek Nation, Indian Territory*:

" You, and each of you, are hereby notified, that the Missouri, Kansas and Texas Railway Company, a corporation, incorporated and organized under and by virtue of the laws of the State of Kansas, claims every alternate section of land, or parts thereof, designated by odd numbers to the extent of ten sections per mile on each side of its line of railroad through the Creek Nation, within twenty miles from the line of said road, and that said claim is based upon an Act of Congress entitled, 'An Act granting lands to the State of Kansas to aid in the construction of the Kansas and Neosho Valley Railroad, and its Extension to Red River,' approved July 25, 1866, and published in volume fourteen of of the United States Statutes at Large, pages two hundred and thirty-six to two hundred and thirty nine, inclusive, and sections one, eight, nine and eleven of which said act are as follows:

'Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of aid-

ing the Kansas and Neosho Valley Railroad Company, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from the eastern terminus of the Union Pacific Railroad, Eastern Division, at the line between Kansas and Missouri, at or near the mouth of the Kansas River, on the south side thereof, southwardly, through the eastern tier of counties in Kansas, with a view of its extension, so as to effect a junction at Red River with a railroad now being constructed from Galveston to Red River at or near Preston, in Texas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company, every alternate section of land or parts thereof, designated by odd numbers to the extent of ten sections per mile on each side of said road, to be selected within twenty miles *from* (of) the line of said road, but in case it shall appear that the United States have when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said company by the said Secretary for the purpose of construction and operation of said railroad, as provided by this act; Provided, That any and all lands heretofore

reserved to the United States by any Act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purposes whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way two hundred feet in width is hereby granted, subject to the approval of the President of the United States; And provided further, That none of the lands hereby granted shall be selected beyond twenty miles from said road.

Sec. 8. And be it further enacted, That said Kansas and Neosho Valley Railroad Company, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas south, through the Indian Territory, to Red River, at or near Preston, in the State of Texas, so as to connect with the railway now being constructed from Galveston to a point at or near Preston, in said State; and the right of way through the Indian Territory, wherever such right is now reserved or may hereafter be reserved to the United States by treaty with the Indian tribes, is hereby granted to said company, to the same extent as granted by the sixth section of this act through the public lands; and in all cases where the right of way, as aforesaid, through the Indian lands, shall not be reserved, to the Government, the said company shall, before constructing its road, procure the consent of the tribe or tribes interested, which consent, with all its terms and conditions, shall be previously approved and indorsed by the President and filed with the Secretary of the Interior.

Sec. 9. And be it further enacted, That the same grants of land through said Indian Territory are

hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act; Provided, That said lands become a part of the public lands of the United States.

Sec. 11. And be it further enacted, That any railroad company chartered under any law of the United States, or of the State of Kansas, which may have been heretofore or shall hereafter be recognized and subsidized by any act of the Congress of the United Stats, may connect, unite, and consolidate with this railroad company, after the same shall be located to the valley of the Neosho River, upon just, fair, and equitable terms, to be agreed upon between the parties, and shall not be against the public interest or the interest of the United States; nor shall any road authorized to connect as aforesaid charge the road so connecting a greater tariff per mile for freight or passengers than is charged for the same per mile by its own road; and provided further, That should the Leavenworth, Lawrence and Fort Gibson Railroad Company, or the Union Pacific Railroad Company, Southern Branch, construct and complete its road to that point on the southern boundary of the State of Kansas where the line of said Kansas and Neosho Valley Railroad shall cross the same, before the said Kansas and Neosho Valley Railroad Company shall have constructed and completed its said road to said point, then and in that event the company so first reaching in completion the said point on the southern boundary of the State of Kansas shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas, with grants of land according to the provisions of this act, but upon the further special condition,

nevertheless, that said railroad company shall have commenced in good faith the construction thereof before the said Kansas and Neosho Valley Railroad Company shall have completed its said railroad to said point; And provided further, That said other railroad company, so having commenced said work in good faith, shall continue to prosecute the same with sufficient energy to insure the completion of the same within a reasonable time, subject to the approval of the President of the United States; And provided further, That the right of way through private property when not otherwise provided for in this act, or by the law of any State through which the road may pass, shall be obtained by said Kansas and Neosho Valley Railroad Company, or either of the other companies named in this act, in accordance with the provisions of section three of an act to amend an act entitled: "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July first, eighteen hundred and sixty-two.'

"Said Missouri, Kansas and Texas Railway Company further respectfully shows that it is the same corporation mentioned in section eleven of said act of Congress hereinabove quoted as 'Union Pacific Railroad Company, Southern Branch,' its corporate name having since been changed to 'Missouri, Kansas and Texas Railway Company,' and that, in accordance with the provisions of said Act of Congress, and said section eleven thereof, it obtained the written approval of the President of the United States to construct and operate its line of railroad from the point on the southern boundary of the State of Kansas, indicated in said act, to the point at or near Preston, in the State of Texas, also indicated in said act, and has since the construction of its line of railroad between said points, in ac-

cordance with the said approval of the President of the United States, operated its said line of railroad between said points, in accordance with the said approval of the President of the United States and said Act of Congress hereinabove referred to.

"And the said Missouri, Kansas and Texas Railway Company respectfully demands that you do not cause to be surveyed, laid out or platted, or appraised, in any townsites in the Creek Nation, any town lots, blocks, streets, alleys, parks, or for any other purpose, any of the sections of land, or any part or parts thereof, hereinabove referred to as being claimed by the said Missouri, Kansas and Texas Railway Company in accordance with the provisions of said Act of Congress approved July twenty-fifth, eighteen hundred and sixty-six, and hereinabove mentioned.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,

By JAMES HAGERMAN AND
CLIFFORD L. JACKSON,
*Its Attorneys.*

Dated at Muskogee, Indian Territory,
May 25th, 1902."

Further complaining, your oratrix states that the said Missouri, Kansas & Texas Railway Company, on the 13th day of November, 1903, also served upon the Honorable J. Blair Shoenfelt, United States Indian Agent, Muskogee, in the Creek Nation, a notice, of which the following is a copy:

"*To the Honorable J. Blair Shoenfelt, United States Indian Agent, Union Agency, Muskogee, Indian Territory*:

"You are hereby notified that the Missouri, Kansas and Texas Railway Company, a corporation in-

corporated and organized under and by virtue of the laws of the State of Kansas, claims every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile, on each side of its line of railroad through the Indian Territory, within twenty miles of the line of said road, and said claim is based upon an Act of Congress entitled, 'An Act granting lands to the State of Kansas to aid in the construction of the Kansas and Neosho Valley Railroad and its Extension to Red River,' approved July 25, 1866, and published in volume fourteen of the United States Statutes at Large, pages two hundred and thirty-six to two hundred and thirty-nine, inclusive, and sections one, eight, nine and eleven of which said Act are as follows:

'Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of aiding the Kansas and Neosho Valley Railroad Company, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from the eastern terminus of the Union Pacific Railroad, Eastern Division, at the line between Kansas and Missouri, at or near the mouth of the Kansas River, on the south side thereof, southwardly, through the eastern tier of counties in Kansas, with a view of its extension, so as to effect a junction at Red River with a railroad now being constructed from Galveston to Red River at or near Preston, in Texas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company, every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of said road, to be selected within twenty miles from (of) the line of said road; but in case it shall appear that the United States have, when the line of said road is definitely

ated, sold any section, or any part thereof, grant-
as aforesaid, or that the right of pre-emption or
mestead settlement has attached to the same, or
at the same has been reserved by the United
ates for any purpose whatever, then it shall be
e duty of the Secretary of the Interior to cause
be selected for the purposes aforesaid, from the
blic lands of the United States nearest to the
tions above specified, so much land as shall be
ual to the amount of such lands as the United
ates have sold, reserved, or otherwise appropriat-
or to which the right of homestead settlement
pre-emption has attached as aforesaid, which
ds thus indicated by the direction of the Secre-
y of the Interior, shall be reserved and held for
e State of Kansas for the use of said company by
e said Secretary for the purpose of the construc-
n and operation of said railroad, as provided by
s act: Provided, That any and all lands here-
fore reserved to the United States by any act
Congress, or in any other manner by competent
thority, for the purpose of aiding in any object
internal improvement or other purpose what-
er, be, and the same are hereby, reserved and ex-
pted from the operation of this act, except so far
it may be found necessary to locate the route
said road through such reserved lands, in which
se the right of way two hundred feet in width is
reby granted, subject to the approval of the
esident of the United States; and provided fur-
er, That none of the lands hereby granted shall
selected beyond twenty miles from the said road.

Section 8. And be it further enacted, That said
nsas and Neosho Valley Railroad Company, its sucess-
rs and assigns, is hereby authorized and empow-
ed to extend and construct its railroad from the
uthern boundary of Kansas south, through the
dian Territory, to Red River, at or near Pres-

ton, in the State of Texas, so as to connect with the railway now being constructed from Galveston to a point at or near Preston, in said State; and the right of way through the Indian Territory, wherever such right is now reserved or may hereafter be reserved to the United States by treaty with the Indian tribes, is hereby granted to said company, to the same extent as granted by the sixth section of this act through the public lands; and in all cases where the right of way, as aforesaid, through the Indian lands, shall not be reserved to the government, the said company shall, before constructing its road, procure the consent of the tribe or tribes interested, which consent, with all its terms and conditions, shall be previously approved and indorsed by the President and filed with the Secretary of the Interior.

'Section 9. And be it further enacted, That the same grants of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: Provided, that said lands become a part of the public lands of the United States.

'Section 11. And be it further enacted, that any railroad company chartered under any law of the United States, or of the State of Kansas, which may have been heretofore or shall hereafter be recognized and subsidized by any act of the Congress of the United States, may connect, unite, and consolidate with this railroad company, after the same shall be located to the valley of the Neosho River, upon just, fair and equitable terms, to be agreed upon between the parties, and shall not be against the public interest or the interest of the United States; nor shall any road auhorized to connect as aforesaid charge the road so connecting a greater

tariff per mile for freight or passengers than is charged for the same per mile by its own road: And provided further, That should the Leavenworth, Lawrence and Fort Gibson Railroad Company, or the Union Pacific Railroad Company, Southern Branch, construct and complete its road to that point on the southern boundary of the State of Kansas where the line of said Kansas and Neosho Valley Railroad shall cross the same, before the said Kansas and Neosho Valley Railroad Company shall have constructed and completed its said road to said point, then and in that event the company so first reaching in completion the said point on the southern boundary of the State of Kansas shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas, with grants of land according to the provisions of this act, but upon the further special condition, nevertheless, that said railroad company shall have commenced in good faith the construction thereof before the said Kansas and Neosho Valley Railroad Company shall have completed its said railroad to said point: And provided further, That said other railroad company, so having commenced said work in good faith, shall continue to prosecute the same with sufficient energy to insure the completion of the same within a reasonable time, subject to the approval of the President of the United States: And provided further, That the right of way through private property when not otherwise provided for in this act, or by the law of any State through which the road may pass, shall be obtained by said Kansas and Neosho Valley Railroad Company, or either of the other companies named in this act, in accordance with the provisions of section three of an act to amend an act entitled 'An Act to aid in the construction of a rail-

road and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes,' approved July first, eighteen hundred and sixty-two.'

"Said Missouri, Kansas and Texas Railway Company further respectfully shows that it is the same corporation mentioned in section eleven of said Act of Congress hereinabove quoted as 'Union Pacific Railroad Company, Southern Branch,' its corporate name having since been changed to 'Missouri, Kansas and Texas Railway Company,' and that it, in accordance with the provisions of said Act of Congress, and said section eleven thereof, obtained the written approval of the President of the United States to construct and operate its line of railroad from the point on the southern boundary of the State of Kansas, indicated in said act, to the point at or near Preston, in the State of Texas, also indicated in said act, and has, since the construction of its line of railroad between said points, in accordance with the said approval of the President of the United States, operated its said line of railroad between said points, in accordance with said approval of the President of the United States, and said Act of Congress hereinabove referred to.

"And said Missouri, Kansas and Texas Railway Company respectfully requests and demands that the sections of land hereinabove referred to as claimed by the said Missouri, Kansas and Texas Railway Company, in accordance with the provisions of said Act of Congress, approved July 25, 1866, and hereinabove mentioned, be treated as the lands of the Missouri, Kansas and Texas Railway Company, and that you receive no applications to sell or lease any of said lands so situated within said Indian Territory, and that you do not list or advertise any of said lands for sale or lease, and that you do not receive any bid or bids for any of

said lands, and that you do not permit any deeds or leases to any of said lands to be executed or acknowledged before you, and that you do not transmit any deeds or leases to any of said lands to the Secretary of the Interior or to any other official, and that you do not deliver any deeds or leases to any of said lands to any grantee or other person, and that you take no part whatsoever in any transaction looking to the sale or leasing of any of said lands.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,

By JAMES HAGERMAN AND

CLIFFORD L. JACKSON,

*Its Attorneys.*

Dated at Muskogee, Ind. Ter.,

November 13, 1903."

Further complaining, your oratrix states that the said Missouri, Kansas & Texas Railway Company also on the 23rd day of November, 1903, served upon the Secretary of the Interior, Ethan Allen Hitchcock, a notice and demand of which the following is a copy:

*"To the Honorable Ethan Allen Hitchcock, Secretary of the Interior, Washington, D. C.*

"You are hereby notified that the Missouri, Kansas & Texas Railway Company, a corporation incorporated and organized under and by virtue of the laws of the State of Kansas, claims every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of its line of railroad through the Indian Territory, within twenty miles of the line of said road, and said claim is based upon an Act of Congress entitled 'An Act granting lands to the

State of Kansas to aid in the construction of the Kansas and Neosho Valley Railroad and its Extension to Red River,' approved July 25, 1866, and published in volume fourteen of the United States Statutes at Large, pages two hundred and thirty-six to two hundred and thirty-nine, inclusive, and sections one, eight, nine and eleven of which said act are as follows:

'Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of aiding the Kansas and Neosho Valley Railroad Company, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from the eastern terminus of the Union Pacific Railroad, Eastern Division, at the line between Kansas and Missouri, at or near the mouth of the Kansas River, on the south side thereof, southwardly, through the eastern tier of counties in Kansas, with a view of its extension, so as to effect a junction at Red River with a railroad now being constructed from Galveston to Red River at or near Preston, in Texas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company, every alternate section of land, or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of said road, to be selected within twenty miles from (of) the line of said road; but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid,

from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of nomestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said company by the said Secretary for the purpose of the construction and operation of said railroad, as provided by this act; Provided, That any and all lands heretofore reserved to the United States by any Act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way two hundred feet in width is hereby granted, subject to the approval of the President of the United States; And provided, further, That none of the lands hereby granted shall be selected beyond twenty miles from the said road.

'Section 8. And be it further enacted, That said Kansas and Neosho Valley Railroad Company, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas south, through the Indian Territory, to Red River, at or near Preston, in the State of Texas, so as to connect with the railway now being constructed from Galveston to a point at or near Preston, in said State; and the right of way through the Indian Territory, wherever such right is now reserved or may hereafter be reserved to the United States by

treaty with the Indian tribes, is hereby granted to said company, to the same extent as granted by the sixth section of this act through the public lands; and in all cases where the right of way, as aforesaid, through the Indian lands, shall not be reserved to the government, the said company shall, before constructing its road, procure the consent of the tribe or tribes interested, which consent, with all its terms and conditions, shall be previously approved and indorsed by the President and filed with the Secretary of the Interior.

'Section 9. And be it further enacted, That the same grants of lands through said Indian Territory are hereby made as provided in the first section of this act, whenexer the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: Provided, That said lands become a part of the public lands of the United States.

'Section 11. And be it further enacted, That any railroad company chartered under any law of the United States, or of the State of Kansas, which may have been heretofore or shall hereafter be recognized and subsidized by any act of the Congress of the United States, may connect, unite, and consolidate with this railroad company, after the same shall be located to the valley of the Neosho River, upon just, fair, and equitable terms, to be agreed upon between the parties, and shall not be against the public interest or the interest of the United Sates; nor shall any road authorized to connect as aforesaid charge the road so connecting a greater tariff per mile for freight or passengers than is charged for the same per mile by its own road; And provided further, That should the Leavenworth, Lawrence and Fort Gibson Railroad Company, or the Union Pacific Railroad Company, Southern

Branch, construct and complete its road to that point on the southern boundary of the State of Kansas where the line of said Kansas and Neosho Valley Railroad shall cross the same, before the said Kansas and Neosho Valley Raidroad Company shall have constructed and completed its said road to said point, then and in that event the company so first reaching in completion the said point on the southern boundary of the State of Kansas shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas, with grants of land according to the provisions of this act, but upon the further special condition, nevertheless, that said railroad company shall have commenced in good faith the construction thereof before the said Kansas and Neosho Valley Railroad Company shall have completed its said railroad to said point; And provided further, That said other railroad company, so having commenced said work in good faith, shall continue to prosecute the same with sufficient energy to insure the completion of the same within a reasonable time, subject to the approval of the President of the United States: And provided further, That the right of way through private property when not otherwise provided for in this act, or by the law of any State through which the road may pass, shall be obtained by said Kansas and Neosho Valley Railroad Company, or either of the other companies named in this act, in accordance with the provisions of section three of an act to amend an act entitled: "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July first, eighteen hundred and sixty-two.'

"Said Missouri, Kansas and Texas Railway Company further respectfully shows that it is the same corporation mentioned in section eleven of said act of Congress hereinabove quoted as 'Union Pacific Railroad Company, Southern Branch,' its corporate name having since been changed to 'Missouri, Kansas and Texas Railway Company,' and that it, in accordance with the provisions of said Act of Congress, and said section eleven thereof, obtained the written approval of the President of the United States to construct and operate its line of railroad from the point on the southern boundary of the State of Kansas, indicated in said act, to the point at or near Preston, in the State of Texas, also indicated in said act, and has, since the construction of its line of railroad between said points, in accordance with the said approval of the President of the United States, operated its said line of railroad between said points, in accordance with said approval of the President of the United States, and said Act of Congress hereinabove referred to.

"And said Missouri, Kansas and Texas Railway Company respectfully requests and demands that the sections of land hereinabove referred to as claimed by the said Missouri, Kansas and Texas Railway Company in accordance with the provisions of said Act of Congress, approved July 25, 1866, and hereinabove mentioned, be treated as the lands of the Missouri, Kansas and Texas Railway Company, and that you receive no applications to sell or lease any of said lands so situated within said Indian Territory, and that you do not approve any deeds or leases to any of said lands, and that you take no part whatsoever in any transaction looking to the sale or leasing of any of said lands.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
By JAMES HAGERMAN AND
CLIFFORD L. JACKSON,
*Its Attorneys.*

Dated at Muskogee, Ind. Ter.,
November 13th, 1903."

Further complaining, your oratrix states that notwithstanding the grant of all of said odd-numbered, alternate sections of land granted as aforesaid to your oratrix as trustee for said railway company, subject only to the communal possessory rights of the several Indian Tribes or Nations of Indians, and notwithstanding the protest of the said Missouri, Kansas & Texas Railway Company against the aforesaid acts and agreements, and in disregard of the rights, interest and estate of your oratrix and the said Missouri, Kansas & Texas Railway Company, to said lands, the same have been allotted to various Creek citizens and others under and pursuant to said Acts of Congress and agreements with the Muskogee or Creek Nation or Tribe of Indians, and said allottees have, in accordance therewith, made application to the Commission to the Five Civilized Tribes for enrollment under the terms of said acts and agreements and selected as and for their respective allotments the lands so included in the terms of said grant to your oratrix as trustee for said railway company, and the Muskogee or Creek Nation or Tribe of Indians have executed deeds to various portions of said land to the said respective allottees, and such deeds have been approved by the Secretary of the Interior on behalf of The United States of America, all of which deeds are a cloud upon the title of your oratrix as trustee for said railway company to said land, and the said allottees now claim to be the owners of the lands covered by said deeds so executed and delivered to them as aforesaid, and are now in possession thereof, and claim the right to sell and dispose of said lands to any person whomsoever under the terms of the aforesaid Acts of Congress and agreements, and under the rules and regulations prescribed by the Secretary of the Interior.

Your oratrix further shows that under the Acts of Congress and treaties herein set forth respecting the selection, allotment and disposition of the lands in question by the individual members and citizens of said Creek Nation, the said lands have been selected and allotted at the land office of the United States established at Muskogee, in the Creek Nation, by practically the same method generally pursued in the disposition of other public lands of the United States; that at said land office plat and tract books were kept, and the members and citizens of said Creek Nation made application for said lands, and when their applications were allowed, certificates of allotment were given to the applicants and thereafter deeds signed by the Secretary of the Interior for and on behalf of the United States and by the Principal Chief of the Creek Nation were executed and delivered to the allottees; that prior to the selection of said lands by the individual members and citizens of said Creek Nation the same were surveyed and platted into townships, ranges, sections and quarter-sections, and joined to the plats and surveys of the other public lands of the United States; that all the expenses of such plattings and surveys were paid by the United States as well as all expenses attending the selections and application for allotments of said lands, and that generally the course pursued respecting the disposition of other public lands of the United States was observed, save in only the one particular that only citizens of the United States, members and citizens of the Creek Nation, were permitted to become allottees of said lands, though in many instances individual white people and negro freedmen, who were not Indians by blood but only members and citizens of the Creek Nation under its usages and customs, were permitted to make selections, and allotments were made to them.

Your oratrix further shows that on the faith of the land grant to your oratrix through the Indian Territory

for the use and benefit of the Missouri, Kansas & Texas Railway Company, said Company secured additional subscribers to its capital stock and borrowed money upon its bonds, secured by mortgages upon its railroad, including said land grant, and the money thus secured was used in the construction of its railroad through the Indian Territory, including the Creek Nation, and it has ever since maintained and operated said railroad as one of the railway public highways of the United States; that the road was constructed through the Indian Territory, including said Creek Nation, in the years 1870, 1871 and 1872, and at that time said Territory was practically a wilderness; that the said railroad, so constructed through the Indian Territory, was extended into Texas and connected with railroads in that State leading to the Gulf of Mexico, thus affording means of railroad transportation from a point of connection with the Union Pacific Railroad at Junction City, through Kansas and the Indian Territory and Texas, on to the Gulf, and establishing public railway highways in the interest of the United States, the State of Kansas, the Indian Territory and the State of Texas, and the people thereof; that the said railroad was the first railroad built in the Territory, and was originally built under an exclusive right to be the only railroad extending from the North to the South through the Indian Territory; that for many years the said railroad through the Indian Territory was unproductive by reason of the sparsely settled population and the want of local traffic; that said railroad would not have been built except for the said land grant, because the money to build the same could not have been secured except upon the faith of such grant; that by the building, operation and maintenance of said railroad the lands in the Indian Territory were greatly enhanced in value, and specially those lands lying within the twenty mile limit on either side of the said railroad, and that the

Indian tribes and nations, and their members and citizens, were and have been thereby greatly benefited and enriched.

Your oratrix shows that in every respect the Railway Company complied with its obligations as to the building, maintenance and operation of said railroad through said Indian Territory, including the Creek Nation, and the same was, as hereinbefore shown, built under the directions of the United States and accepted by the United States for and on behalf of itself and of the Indian nations and tribes, their members and citizens.

Your oratrix further shows that the defendants and the other members and citizens and allottees in the said Creek Nation and those holding under them, contrary to equity and good conscience, have combined, confederated and planned, and still are combining, confederating and planning, to defeat the rights of your oratrix to the land grant through said Creek Nation, with full knowledge of all the rights and equities of your oratrix in and to the odd numbered sections of land within said Nation within twenty miles on either side of the said railroad, to the prejudice and injury of your oratrix. And your oratrix submits that it has the right to have its title to the said odd numbered sections in the Creek Nation, within twenty miles of either side of the railroad, established by a decree of this Court in this cause, and the rights and interests, if any, of the allottees and those holding under them or any of them declared to be inferior to the rights and interests of your oratrix.

Your oratrix further represents and shows that the value of the odd numbered sections within twenty miles on each side of the railroad of the said Missouri, Kansas & Texas Railway Company and herein claimed and sued for, was at the time of their respective allotments as herein shown, at least an average of $20 per acre or for the entire

516,480 acres of odd numbered sections of an aggregate value of $10,329,600, and such is at least their present value.

Your oratrix further avers that should this court through any equitable considerations reach the conclusion that the allotments already made should not be disturbed, then your oratrix is entitled to have an accounting as of the time of the respective allotments of the value of said odd numbered sections and the interest of your oratrix therein, and to have a decree ordering and adjudging that said sums be paid by the United States to your oratrix as trustee as compensation for the loss suffered by your oratrix as trustee in consequence of the breach of the contracts embraced in said land grants of July 25th and 26th, 1866, by the United States.

Your oratrix further shows that by virtue of the premises, it will be put to a great multiplicity of suits, irreparable damage and great expense unless it is aided by the equitable jurisdiction and powers of this honorable court, and that the lands granted as aforesaid to your oratrix will be lost to it and the Missouri, Kansas & Texas Railway Company, unless prevented by the decree and order of this honorable court.

Your oratrix further shows that this is a case and controversy of a civil and justiciable nature wherein the amount in controversy is at least ten millions of dollars, and whereof this court, under Section 2 of Article III of the Constitution of the United States has original jurisdiction.

In consideration whereof, and inasmuch as your oratrix is remediless in the premises at and by the strict rule of law, and is only relievable in this Court, where matters of this kind are properly cognizable and relievable, your oratrix therefore prays the aid of this Honorable Court, and asks that a decree be rendered, finding

and adjudging that your oratrix is the owner as trustee for said Missouri, Kansas & Texas Railway Company in fee simple of all lands situated within the Muskogee or Creek Nation included within the odd numbered sections to the extent of ten sections per mile on each side of said road within twenty miles of the line of said road, and that your oratrix's title thereto be established against any claim of any and all the defendants including any and all of the said allottees, or of any one claiming by, through or under any of the said allottees, and that the defendants including the said allottees, and those holding under them and each of them, be forever barred against having or claiming any right or title to or in any of said lands adverse to your oratrix as trustee for said railway company, and that said allottees and those holding under them be adjudged and decreed to surrender possession thereof to your oratrix as such trustee for said railway company, and be perpetually enjoined from disposing of, alienating, incumbering, or attempting to dispose of or alienate, incumber or convey, said land, or any portion thereof, and that it be adjudged that any right, title, interest or claim which the said allottees, or any persons holding under them, may have or claim in or to the said land, or any part thereof, under or by virtue of the deeds so executed and delivered to them by said Muskogee or Creek Nation or Tribe of Indians, and approved by the Secretary of the Interior on behalf of the United States, be declared to be held in trust by the said allottees and each of them, and the persons holding under them, for your oratrix as trustee for said railway company, and that said allottees and persons holding under them be further ordered and directed to convey said lands so held and claimed by them to your

oratrix as such trustee for said railway company, and in default of them or any of them doing so, that a commissioner be appointed by this Court to execute such conveyances, or in the event that from any equitable considerations the court should entertain the view that the allottees and those claiming under them should not be disturbed, then that an account be taken of the value of the lands in controversy at the time of the respective allotments, and the defendant, the United States of America, be ordered, adjudged and decreed to pay to your oratrix, as trustee, the sum of such values, and for all other and further relief touching the premises to which your oratrix may be entitled, and your oratrix will ever pray.

May it therefore please your Honors, to grant unto your oratrix, a writ of subpoena, directed to The United States of America, Ethan Allen Hitchcock, as Secretary of the Interior, Francis E. Leupp as Commissioner of Indian Affairs, Tams Bixby, as Commissioner to the Five Civilized Tribes, J. George Wright, as United States Indian Inspector for the Indian Territory; Dana H. Kelsey, as United States Indian Agent for the Indians of the Union Agency in the Indian Territory, the Muskogee or Creek Nation or Tribe of Indians; Pleasant Porter, as Principal Chief of the Muskogee or Creek Nation or Tribe of Indians; William Fisher and Joseph Fisher; Cornelius L. Bonham; Michael Fitzpatrick and Jennie C. Fitzpatrick; George F. Roth, Samuel Johnson and Elmer Johnson, John F. Ingram, David Whitlow, George W. Grayson, Napoleon B. Moore, Conny Murphy, David A. Lee, Googan Sarty, James Childres, W. B. Rogers, Alexander L. Posey, Wm. N. Moore, Temiye Cornells, John Jefferson, Henry C. Reed, Sam Grayson, George Malvern, Jake (A. J.) Berryhill, Wattey Yohola, George Marshall,

Robert Bruner, Sarah A. Asbill, and Jake Smith, for themselves and all other allottees of land in the Muskogee or Creek Nation whose allotments in whole or in part are included within every alternate section of land or parts thereof designated by odd numbers to the extent of ten sections per mile on each side of the Missouri, Kansas & Texas Railway and within twenty miles of the line of said road, and all persons holding under said allottees or any of them, and each of them, thereby commanding them and each of them, at a certain time and under a certain penalty therein to be limited, personally to appear before this Honorable Court, and then and there full, true, direct and perfect answer make to all and singular the premises, answer under oath being specifically waived, and further to stand to, perform and abide such further order, direction and decree herein as to this Honorable Court shall seem meet.

CHILES C. COLEMAN,
Solicitor for and Attorney-General
of the State of Kansas.

JOSEPH H. CHOATE,
JAMES HAGERMAN,
ADRIAN H. JOLINE,
A. B. BROWNE,
JOHN MADDEN,
JOSEPH M. BRYSON,
Of Counsel.

United States of America, }
State of Kansas. } ss.

John Madden, being duly sworn upon his oath, says that he is a citizen of the State of Kansas and is General Attorney for the Missouri, Kansas & Texas Railway Company, the Company named in the foregoing bill of complaint; that he is one of the associate counsel for Complainant in this case; that he is in charge of the land grants and records of the said Company pertaining thereto and referred to in said bill; that he has read the said bill of complaint and knows the contents thereof, and that the facts therein stated so far as they are within his knowledge are true and so far as they are based upon information he verily believes them to be true.

.....

Subscribed and sworn to before me, the undersigned Notary Public, this ..... day of ....., 1906.

.....

## "EXHIBIT A."

**TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE CREEK NATION OF INDIANS; CONCLUDED JUNE 14, 1866; RATIFICATION ADVISED, WITH AMENDMENTS, JULY 19, 1866; AMENDMENTS ACCEPTED JULY 23, 1866; PROCLAIMED AUGUST 11, 1866.**

### ANDREW JOHNSON,

**President of the United States of America,**

*To All and Singular to Whom These Presents Shall Come, Greetings*:

WHEREAS, A treaty was made and concluded at the city of Washington, in the District of Columbia, on the fourteenth day of June, in the year of our Lord one thousand, eight hundred and sixty-six, by and between Dennis N. Cooley and Elijah Sells, Commissioners, on the part of the United States, and Ok-to-has-Harjo, Cow-mikko and Cotch-cho-chee, delegates at large of the Creek nation of Indians, and D. N. McIntosh and James M. C. Smith, special delegates of the Southern Creeks, on the part of said Creek nation of Indians and Southern Creeks, all of which delegates at large and special delegates were duly authorized thereto by said Creek nation and Southern Creeks, which treaty is in words and figures following, to-wit:

TREATY OF CESSION AND INDEMNITY, concluded at the city of Washington on the fourteenth day of June, in

the year of our Lord one thousand, eight hundred and sixty-six, by and between the United States, represented by Dennis N. Cooley, Commissioner of Indian Affairs, Elijah Sells, Superintendent of Indian Affairs for the Southern superintendency, and Col. Ely S. Parker, special commissioner, and the Creek nation of Indians, represented by Ok-tars-sars-harjo, or Sands; Cow-e-to-me-co and Che-chu-chee, delegates at large, and D. N. McIntosh and James Smith, special delegates of the Southern Creeks.

## PREAMBLE.

WHEREAS, existing treaties between the United States and the Creek nation have become insufficient to meet their mutual necessities; and whereas, the Creeks made a treaty with the so-called Confederate States, on the tenth of July, one thousand, eight hundred and sixty-one, whereby they ignored their allegiance to the United States, and unsettled the treaty relations existing between the Creeks and the United States, and did so render themselves liable to forfeit to the United States all benefits and advantages enjoyed by them in lands, annuities, protection and immunities, including their lands and other property held by grant or gifts from the United States; and whereas, in view of said liabilities, the United States require of the Creeks a portion of their land whereon to settle other Indians; and whereas, a treaty of peace and amity was entered into between the United States and the Creeks and other tribes at Fort Smith, September tenth, eighteen hundred and sixty-five, whereby the Creeks revoked, cancelled and repudiated the aforesaid treaty made with the so-called Confederate States; and whereas, the

United States, through its commissioners, in said treaty of peace and amity, promised to enter into treaty with the Creeks to arrange and settle all questions relating to and growing out of said treaty with the so-called Confederate States: Now, therefore, the United States, by its commissioners and the above-named delegates of the Creek nation, the day and year above mentioned, mutually stipulate and agree, on behalf of the respective parties, as follows, to-wit:

ARTICLE I. There shall be perpetual peace and friendship between the parties to this treaty, and the Creeks bind themselves to remain firm allies and friends of the United States, and never to take up arms against the United States, but always faithfully to aid in puting down its enemies. They also agree to remain at peace with all other Indian tribes; and in return the United States guarantees them quiet possession of their country and protection against hostilities on the part of other tribes. In the event of hostilities, the United States agrees that the tribe commencing and prosecuting the same shall, as far as may be practicable, make just reparation therefor. To insure this protection, the Creeks agree to a military occupation of their country at any time, by the United States, and the United States agree to station and continue in said country, from time to time, at its own expense, such force as may be necessary for the purpose. A general amnesty of all past offenses against the laws of the United States, committed by any member of the Creek nation is hereby declared. And the Creeks, anxious for the restoration of kind and friendly feelings among themselves, do hereby declare an amnesty for all past offenses against their government, and no Indian or Indians shall be pro-

scribed, or any act of forfeiture or confiscation passed against those who have remained friendly to or taken up arms against the United States, but they shall enjoy equal privileges with other members of said tribe, and all laws heretofore passed inconsistent herewith are hereby declared inoperative.

ARTICLE II. The Creeks hereby covenant and agree that henceforth neither slavery nor involuntary servitude, otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted in accordance with laws applicable to all members of said tribe, shall ever exist in said nation; and inasmuch as there are among the Creeks many persons of African descent, who have no interest in the soil, it is stipulated that hereafter these persons lawfully residing in said Creek country, under their laws and usages, or who have been thus residing in said country, and may return within one year from the ratification of this treaty, and their descendants and such others of the same race as may be permitted by the laws of the said nation to settle within the limits of the jurisdiction of the Creek nation as citizens (thereof), shall have and enjoy all the rights and privileges of native citizens, including an equal interest in the soil and national funds, and the laws of the said nation shall be equally binding upon and give equal protection to all such persons, and all others, of whatsoever race or color, who may be adopted as citizens or members of said tribe.

ARTICLE III. In compliance with the desire of the United States to locate other Indians and freedmen thereon, the Creeks hereby cede and convey to the United States, to be sold to and used as homes for such

other civilized Indians as the United States may choose to settle thereon, the west half of their entire domain, to be divided by a line running north and south; the eastern half of said Creek lands being retained by them, shall, except as herein otherwise stipulated, be forever set apart as a home for said Creek nation; and in consideration of said cession of the west half of their lands, estimated to contain three million, two hundred and fifty thousand, five hundred and sixty acres, the United States agrees to pay the sum of thirty (30) cents per acre, amounting to nine hundred and seventy-five thousand, one hundred and sixty-eight dollars, in the manner hereinafter provided, to-wit: Two hundred thousand dollars shall be paid per capita in money, unless otherwise directed by the President of the United States, upon the ratification of this treaty, to enable the Creeks to occupy, restore and improve their farms, and to make their nation independent and self-sustaining, and to pay the damages sustained by the mission schools on the North Fork and the Arkansas rivers not to exceed two thousand dollars, and to pay the delegates such per diem as the agent and Creek council may agree upon, as a just and fair compensation, all of which shall be distributed for that purpose by the agent, with the advice of the Creek council, under the direction of the Secretary of the Interior. One hundred thousand dollars shall be paid to soldiers that enlisted in the Federal army, and the loyal refugee Indians and freedmen who were driven from their homes by the rebel forces, to reimburse them in proportion to their respective losses; four hundred thousand dollars shall be paid per capita in money to said Creek nation, unless otherwise directed by the President of the United States, under the direc-

tion of the Secretary of the Interior, as the same may accrue from the sale of land to other Indians. The United States agree to pay to said Indians, in such manner and for such purposes as the Secretary of the Interior may direct, interest at the rate of 5 per cent per annum from the date of the ratification of this treaty, on the amount hereinbefore agreed upon for said ceded lands, after deducting the said two hundred thousand dollars; the residue, two hundred and seventy-five thousand, one hundred and sixty-eight dollars, shall remain in the treasury of the United States, and the interest thereon, at the rate of 5 per centum per annum, be annually paid to said Creeks as above stipulated.

ARTICLE IV. Immediately after the ratification of this treaty the United States agree to ascertain the amount due the respective soldiers who enlisted in the Federal army, loyal refugee Indians and freedmen, in proportion to their several losses, and to pay the amount awarded each in the following manner, to-wit: A census of the Creeks shall be taken by the agent of the United States for said nation, under the direction of the Secretary of the Interior, and a roll of the names of all soldiers that enlisted in the Federal army, loyal refugee Indians and freedmen, be made by him. The Superintendent of Indian Affairs of the Southern superintendency and the agent of the United States for the Creek nation shall proceed to investigate and determine from said roll the amounts due the respective refugee Indians, and shall transmit to the Commissioner of Indian Affairs for his approval, and that of the Secretary of the Interior, their awards, together with the reasons therefor. In case the awards so made shall be duly approved, said awards shall be paid from the proceeds

of the sale of said lands within one year from the ratification of this treaty, or so soon as said amount of one hundred thousand ($100,000) can be raised from the sale of said land to other Indians.

ARTICLE V. The Creek nation hereby grant a right of way through their lands to the Choctaw and Chickasaw country, to any company which shall be duly authorized by Congress, and shall, with the express consent and approabtion of the Secretary of the Interior, undertake to construct a railroad from any point north of to any point in or south of the Creek country, and likewise from any point on their eastern to their western or southern boundary, but said railroad company, together with all its agents and employes, shall be subject to the laws of the United States relating to intercourse with Indian tribes, and also to such rules and regulations as may be prescribed by the Secretary of the Interior for that purpose, and the Creeks agree to sell to the United States, or any company duly authorized as aforesaid, such lands not legally owned or occupied by a member or members of the Creek nation, lying along the line of said contemplated railroad, not exceeding on each side thereof a belt or strip of land three miles in width, at such price per acre as may be eventually agreed upon between said Creek nation and the party or parties building said road, subject to the approval of the President of the United States: Provided, however, that said land thus sold shall not be reconveyed, leased or rented to or be occupied by any one not a citizen of the Creek nation, according to its laws and recognized usages: Provided also, That officers, servants and employes of said railroad necessary to its construction and management shall not be excluded from such necessary occu-

pancy, they being subject to the provisions of the Indian intercourse law and such rules and regulations as may be established by the Secretary of the Interior, nor shall any conveyance of any of said lands be made to the party building and managing said road until its completion as a first-class railroad, and its acceptance as such by the Secretary of the Interior.

ARTICLE VI. Inasmuch as the bonds, or a portion thereof, in which the Creek orphan fund has been heretofore invested, from certain causes have largely depreciated in value, and are for the purpose for which said fund was set aside inproductive, it is hereby further stipulated that such of the bonds now held by the Secretary of the Interior, in trust for the orphans of the Creek nation, as may be necessary to establish a manual labor school for the improvement and education of the orphan children of said nation shall be disposed of, and the avails thereof used for the purpose, under the direction of the Secretary of the Interior. The residue of said fund shall be retained in the treasury of the United States, upon which interest at the rate of 5 per cent shall annually be paid for the maintenance and support of said school.

ARTICLE VII. The Creeks hereby agree that the Seminole tribe of Indians may sell and convey to the United States all or any portion of the Seminole lands, upon such terms as may be mutually agreed upon by and between the Seminole and the United States.

ARTICLE VIII. It is agreed that the Secretary of the Interior forthwith cause the line dividing the Creek country, as provided for by the terms of the sale of

Creek lands to the United States in Article III. of this treaty, to be accurately surveyed under the direction of the Commissioner of Indian Affairs, the expenses of which survey shall be paid by the United States.

ARTICLE IX. Inasmuch as the agency buildings of the Creek tribe have been destroyed during the late war, it is further agreed that the United States shall, at their own expense, not exceeding ten thousand dollars, cause to be erected suitable agency buildings, the sites whereof shall be selected by the agent of said tribe, in the reduced Creek reservation, under the direction of the Superintendent of Indian Affairs.

In consideration whereof the Creeks hereby cede and relinquish to the United States one section of their lands to be designated and selected by their agent, under the direction of the Superintendent of Indian Affairs, upon which said agency buildings shall be erected, which section of land shall revert to the Creek nation when said agency buildings are no longer used by the United States, upon said nation paying a fair and reasonable value for said buildings at the time vacated.

ARTICLE X. The Creeks agree to such legislation as Congress and the President of the United States may deem necessary for the better administration of justice and the protection of the rights of person and property within the Indian Territory: Provided, however, (That) said legislation shall not in any manner interfere with or annul their present tribal organization, rights, laws, privileges and customs. The Creeks also agree that a general council, consisting of delegates elected by each nation or tribe lawfully resident within the Indian Territory, may be annually convened in said territory,

which council shall be organized in such manner and possess such powers as are hereinafter described.

*First.* After the ratification of this treaty, and as soon as may be deemed practicable by the Secretary of the Interior, and prior to the first session of said council, a census or enumeration of each tribe lawfully resident in said territory, shall be taken under the direction of the Superintendent of Indian Affairs, who for that purpose is hereby authorized to designate and appoint competent persons, whose compensation shall be fixed by the Secretary of the Interior and paid by the United States.

*Second.* The first general council shall consist of one member from each tribe, and an additional member for each one thousand Indians, or fraction of a thousand greater than five hundred, being members of any tribe lawfully resident in said territory, and shall be selected by said tribes respectively, who may assent to the establishment of said general council, and if none should be thus formally selected by any nation or tribe, the said nation or tribe shall be represented in said general council by the chief or chiefs and head men of said tribe, to be taken in the order of their rank as recognized in tribal usages, in the same number and proportion as above indicated. After the said census shall have been taken and completed, the Superintendent of Indian Affairs shall publish and declare to each tribe the number of members of said council to which they shall be entitled under the provision of this article and the persons so entitled to so represent said tribe, shall meet at such time and place as he shall appoint, but thereafter the time and place of the sessions of said council shall be determined by its action: Provid-

ed, That no session in any one year shall exceed the term of thirty days, and provided that special sessions of said council may be called whenever, in the judgment of the Secretary of the Interior, the interest of said tribe shall require.

*Third.* Said general council shall have power to legislate upon all rightful subjects and matters pertaining to the intercourse and relations of the Indian tribes and nations resident in said territory, the arrest and extradition of criminals and offenders escaping from one tribe to another, the administration of justice between the members of the several tribes of said territory, and persons other than Indians and members of said tribes or nations, the construction of works of internal improvement, and the common defense and safety of the nations of said territory. All laws enacted by said general council shall take effect at such time as may therein be provided, unless suspended by direction of the Secretary of the Interior or the President of the United States. No laws shall be enacted inconsistent with the Constitution of the United States, or the laws of Congress, or existing treaty stipulations with the United States, nor shall said council legislate upon matters pertaining to the organization, laws or customs of the several tribes, except as herein provided for.

*Fourth.* Said councils shall be presided over by the Superintendent of Indian Affairs, or, in case of his absence from any cause, the duties of said superintendent enumerated in this article shall be performed by such person as the Secretary of the Interior may direct.

*Fifth.* The Secretary of the Interior shall appoint a secretary of said council, whose duty it shall be to keep

an accurate record of all the proceedings of said council, and who shall transmit a true copy of all such proceedings, duly certified by the Superintendent of Indian Affairs, to the Secretary of the Interior immediately after the sessions of said council shall terminate. He shall be paid out of the treasury of the United States an annual salary of five hundred dollars.

*Sixth.* The members of said council shall be paid by the United States the sum of four dollars per diem during the time actually in attendance on the session of said council, and at the rate of four dollars for every twenty miles necessary (il) y traveled by them in going to and returning to their homes, respectively, from said council, to be certified by the secretary of said council and the superintendent of Indian affairs.

*Seventh.* The Creeks also agree that a court or courts may be established in said territory, with such jurisdiction and organized in such manner as Congress may by law provide.

ARTICLE XI. The stipulations of this treaty are to be a full settlement of all claims of said Creek Nation for damages and losses of every kind growing out of the late rebellion and all expenditures by the United States of annuities in clothing and feeding refugee and destitute Indians since the diversion of annuities for that purpose consequent upon the late war with the so-called confederate states; and the Creeks hereby ratify and confirm all such diversions of annuities heretofore made from the funds of the Creek Nation, by the United States, and the United States agree that no annuities shall be diverted from the objects for which they were

originally devoted by treaty stipulations with the Creeks, to the use of refugee and destitute Indians other than the Creeks or members of the Creek Nation after the close of the present fiscal year, June thirtieth, eighteen hundred and sixty-six.

ARTICLE XII. The United States reaffirms and reassumes all obligations of treaty stipulations with the Creek Nation, entered into before the treaty of said Creek Nation with the so-called confederate states, July tenth, eighteen hundred and sixty-one, not inconsistent herewith; and further agrees to renew all payments accruing by force of said treaty stipulations from and after the close of the present fiscal year, June thirtieth, eighteen hundred and sixty-six, except as is provided in article eleven.

ARTICLE XIII. A quantity of land not exceeding one hundred and sixty acres, to be selected according to legal sub-divisions, in one body, and to include their improvements, is hereby granted to every religious society or denomination which has erected, or which, with the consent of the Indians, may hereafter erect buildings within the Creek country for missionary or educational purposes; but no land thus granted nor the buildings which have been or may be erected thereon shall ever be sold or otherwise disposed of, except with the consent and approval of the Secretary of the Interior; and whenever any such lands or buildings shall be so sold or disposed of, the proceeds thereof shall be applied, under the direction of the Secretary of the Interior, to the support and maintenance of other similar establishments for the benefit of the Creeks and such other persons as may be or may hereafter become mem-

bers of the tribe according to its laws, customs, and usages; and if at any time said improvements shall be abandoned for one year for missionary or educational purposes, all the rights herein granted for missionary and educational purposes shall revert to the said Creek Nation.

ARTICLE XIV. It is further agreed that all treaties heretofore entered into between the United States and the Creek nation which are inconsistent with any of the articles or provisions of this treaty shall be and are hereby rescinded and annulled; and it is further agreed that ten thousand dollars shall be paid by the United States, or so much thereof as may be necessary, to pay the expenses incurred in negotiating the foregoing treaty.

IN TESTIMONY WHEREOF, we, the commissioners representing the United States and the delegates representing the Creek nation, have hereunto set our hands and seals at the place and on the day and year above written.

D. N. COOLEY, Com. Ind. Affairs, (Seal)
ELIJAH SELLS, Supt. Ind. Affairs, (Seal)
OK-TA-HAS-HARJO (his X mark), (Seal)
COW MIKKO (his X mark), (Seal)
COTCH-CHO-CHEE (his X mark), (Seal)
JAMES M. C. SMITH.

In presence of:

J. W. Dunn, U. S. Indian Agent,
J. Harlan, U. S. Indian Agent,
Charles E. Mix,
J. M. Tebbetts,
Geo. A. Reynolds, U. S. Indian Agent,

John B. Sanborn,
John F. Brown, Seminole Delegate,
John Chupco (his X mark),
Fos-Har-Jo (his X mark),
Cho-Cote-Huga (his X mark),
R. Fields, Cherokee Delegate,
Douglas H. Cooper,
Wm. Penn Adair,

Harry Island (his X mark), U. S. Interpreter, Creek Nation,

Suludin Waitie.

AND WHEREAS, The said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the nineteenth day of July, one thousand, eight hundred and sixty-six, advise and consent to the ratification of the same, with amendments, by a resolution in the words and figures following, to-wit:

In Executive Session, Senate of the United States, July 19, 1866:

*Resolved* (two-thirds of the Senators present concurring), That the Senate advise and consent to the ratification of the treaty of cession and indemnity concluded at the city of Washington, on the fourteenth day of June, eighteen hundred and sixty-six, by and between the United States, represented by their commissioners and the Creek Nation of Indians, with the following

AMENDMENTS:

I. Article III., line 21, after the word "paid" insert the words, "in money and divided;" same line, strike out the words, "in money."

2. Article III., line 43, after the word "paid" insert the words, "in money and divided;" same line, strike out the words, "in money."

3. Strike out all of Article VI.

Attest: J. W. FORNEY, Secretary.

AND WHEREAS, The foregoing amendments having been fully explained and interpreted to the aforenamed delegates at large and special delegates of the Creek nation of Indians and Southern Creeks, they did, on the twenty-third day of July, one thousand, eight hundred and sixty-six, give their free and voluntary assent to said amendments, in the words and figures following, to-wit:

WHEREAS, The Senate of the United States did, on the 19th day of July, 1866, advise and consent to the ratification of the treaty of cession and indemnity concluded at the city of Washington on the 14th day of June, 1866, by and between the United States, represented by their commissioners, and the Creek nation of Indians, with the following amendments, to-wit:

1. Article III., line 21, after the word "paid" insert the words, "in money and divided;" same line, strike out the words, "in money."

2. Article III., line 43, after the word "paid" insert

the words, "in money and divided;" same line, strike out the words, "in money."

3. Strike out all of Article VI.

Now, therefore, we, the delegates representing the Creek nation of Indians, do hereby assent and agree to the said amendments above written, the same having been interpreted to us, and being fully understood by us.

Witness our hands and seals this 23d day of July, A. D. 1866, at Washington, D. C.

OK-TA-HAS-HARJO (his X mark), (Seal)
COW MIKKO (his X mark), (Seal)
COTCH-CHO-CHEE (his X mark), (Seal)
D. N. MC INTOSH, (Seal)
JAMES M. C. SMITH. (Seal)

In presence of:

Charles E. Mix,
W. R. Irwin,
Lewis S. Hayden,
G. D. Curtis,
Geo. A. Reynolds,
E. B. Grayson,
John F. Brown,
J. Harlan, U. S. Indian Agent.

Harry Island (his X mark), U. S. Interpreter for Creeks,

Robert Johnson (his X mark), U. S. Interpreter for Seminoles,

John Chupco (his X mark),
Fos Harjo (his X mark),
Cho-cote Harjo (his X mark).

Now, therefore, be it known that I, ANDREW JOHNSON, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in its resolution of the nineteenth of July, one thousand, eight hundred and sixty-six, accept, ratify and confirm the said treaty with the amendments as aforesaid.

IN TESTIMONY WHEREOF, I have hereto signed my name and caused the seal of the United States to be affixed.

Done at the city of Washington this eleventh day of August, in the year of our Lord one thousand, eight hundred and sixty-six, and of the independence of the United States of America the ninety-first.

ANDREW JOHNSON.

By the President:

HENRY STANBERRY, Acting Secretary of State.

## "EXHIBIT B."

BOND OF THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY TO THE UNITED STATES OF AMERICA.

*"Know All Persons by These Presents:*

That we, the Missouri, Kansas and Texas Railway Company (formerly the Union Pacific Railway Company, Southern Branch), a corporation organized under the laws of the State of Kansas, and
are held and firmly bound unto the United States of America in the penal sum of five hundred thousand ($500,000) dollars, money of the said United States; to which payment, well and truly to be made, we bind ourselves, jointly and severally, our joint and several heirs, executors, administrators, successors and assigns, firmly by these presents.

Signed by the President of the Missouri, Kansas and (U. S. Int. Rev. Stamp One Dollar.) Texas Railway Company, and attested by the Secretary thereof under its seal, and signed with our hands and sealed with our seals this sixth day of August, in the year eighteen hundred and seventy.

The condition of the foregoing obligation is such, That whereas the said Missouri, Kansas and Texas Railway Company has received the written approval of the President of the United States to construct and operate its line of railroad from the termination of their completed road on the southern boundary of the

State of Kansas, through the Indian Territory, to a point at or near Preston, in the State of Texas, with a Branch from at or near Fort Gibson, in said Territory, to Fort Smith, in the State of Arkansas, upon the conditions prescribed, which are as follows, to-wit:

That said trunk road and branch "shall be made upon the easiest grades and curves which are practicable; its roadbed raised above the reach of floods and thoroughly drained; its bridges and culverts of solid, durable and approved construction; its ties not less than 2700 to the mile, and of hard wood; its rails not less than 56 pounds weight to the yard, thoroughly coupled with the fish joints and the road, throughout its complete length before it shall be finally accepted, well ballasted with stone or gravel, and fully furnished with side tracks, water and fuel stations, and rolling stock, up to the standard required of the railways to the Pacific Ocean." "For the purpose of securing such construction" "a Commission of three competent persons (are to) be appointed, whose certificate shall be required in similar manner, and who shall be paid by said Company, at the same rate as was done in the case of the Union Pacific Railroad to the Pacific Ocean."

And upon the further condition that said Company "shall, in every particular, respect the rights of said Indian tribes, and the individuals thereof, as guaranteed by the treaties, and the intercourse and other statutes of the United States; that they shall commit no waste upon said Indian lands, nor take materials therefrom, except under contract with said Indian tribes, or individuals thereof, who may make sales of individual property; such contracts, whether with the nations or indi-

viduals, to be valid only when approved by the proper officers of the Indian Department."

Now, if the said Missouri, Kansas and Texas Railway Company, their successors and assigns, shall truly and faithfully comply with the conditions and requirements herein set forth, then this obligation shall be null, void, and of no effect; otherwise to remain and be in full force and virtue.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY,

By

LEVI PARSONS, President.
H. B. HENSON, Secretary.

( Seal )
( M., K. & T. )
( Ry. Co. )
( 1870.) )
Attest:

H. B. HENSEN,
Secty.

United States of America, )
Southern Dist. of New York, ) ss.:

Be it remembered, on this tenth day of August, in the year one thousand eight hundred and seventy, before me, James Betts Metcalf, a United States Commissioner duly appointed by the Circuit Court of the United States for the Southern District of New York, in the Second Circuit; came Levi Parsons and H. B. Henson, to me personally known and also known to me to be, respectively, the President and Secretary of the Missouri, Kansas and Texas Railway Company, the corporation

described in the foregoing instrument, who, being by me severally sworn, each for himself did depose and say as follows:

The said Levi Parsons, that he resided in the City of New York; that he was President of the Missouri, Kansas and Texas Railway Company, and that he executed the foregoing instrument as President of said Company, by order of the Board of Directors thereof. The said H. B. Henson, that he resided in the City of Brooklyn, in the State of New York; that he was Secretary of the Missouri, Kansas and Texas Railway Company; that he knew the corporate seal of said Company; that the seal affixed to the foregoing instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said Company, and that he signed his name thereto, by the like order, as Secretary of said Company.

Witness my hand and official seal the day and year aforesaid.

JAMES BETTS METCALF,
United States Commissioner.

( Seal )
( U. S. Commissioner )
( Metcalf, )
( So. Dist. of New York. )

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FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 25, Original.

11 Orig
C. T. 190

THE STATE OF KANSAS, COMPLAINANT,

*vs.*

THE UNITED STATES ET AL., DEFENDANTS.

# ANSWER TO SUGGESTIONS SUBMITTED IN OPPOSITION TO MOTION FOR LEAVE TO FILE.

CHILES C. COLEMAN,
*Attorney General of the State of Kansas.*

JOSEPH H. CHOATE,
JAMES HAGERMAN,
ADRIAN H. JOLINE,
A. B. BROWNE,
JOHN MADDEN,
JOSEPH M. BRYSON,
*Of Counsel.*

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 21561

SUPREME COURT OF THE UNITED STATES.

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## ANSWER TO SUGGESTIONS SUBMITTED IN OPPOSITION TO MOTION FOR LEAVE TO FILE.

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### I.

SUBJECT-MATTER.

Treating the facts pleaded according to their legal effect, it is obvious the bill states a justiciable case. The State of Kansas asserts that, by certain acts of Congress therein set forth, lands were granted by the United States to the State as trustee to aid construction of a railroad through the Indian Territory; that the road was seasonably built, the condition subsequent of the grant fully performed, and the grant of lands thereby fully earned; that thereafter, under authority of certain acts of Congress and agreements with the Creek Nation or tribe therein set forth, the common or tribal Indian

title *and* the ultimate title in fee hitherto held by the United States and so granted to the State were sought to be merged into individual ownership of the *entire* allodium or fee title by allotment and conveyance to separate individual members of the tribe in specific, separate tracts, resulting in legal effect in the *extinction* of the common tribal possession or occupancy, whereby the full right of possession is joined to the fee title so originally transferred to the State as such trustee. The prayer for relief is in the alternative (1) for decree establishing such perfect title as embracing all elements of the entire title in fee, or (2) decree for the money value of the property as against the United States for such breach of the original contract between the sovereigns.

PARTIES.

The State, as trustee, is properly party plaintiff. Her beneficiary need not be joined. The rule in that regard is elementary.

The bill is presented by the attorney general of the State, whose authority to thus appear and so act is implied by reason of his official position and consequent power, as this court has expressly so recognized the power of the attorney general to file bills for relief on behalf of the United States in

> *United States vs. San Jacinto Tin Co.,* 125 U. S., 273, 279-284.

But in point of fact this bill is presented by the direct authority of the chief executive of the State, as appears by his original written direction to that end, herewith submitted, and which reads as follows:

> "Whereas the Missouri, Kansas & Texas Railway Company had made application for an order to bring

the necessary suit or suits to test the rights of the State to recover the lands mentioned in said application, which said lands are the lands included in land grants to the State of Kansas as trustee for said railway company under certain acts of Congress, and accepted by acts of the legislature of said State; and

"Whereas it appears that in justice to all parties who may claim any interest in lands included in said grants such suit or suits should be brought at the earliest possible moment and the rights of all determined:

"Therefore it is ordered that said application is hereby granted and the attorney general, in connection with counsel provided by said railway company, are hereby authorized and directed to institute the necessary suit or suits to test the rights of the State to recover the lands mentioned in said application through the Indian Territory, the State to be fully indemnified and protected by said railway company from all costs and expenses of litigation, including attorneys' fees."

And the authority of the governor is clear under General Statutes of Kansas, 1901, which provides:

"SECTION 7271, DUTIES.—SEC. 71. The attorney "general shall appear for the State, and prosecute and "defend all actions and proceedings, civil or criminal, "in the supreme court, in which the State shall be "interested or a party, and shall also, when required "by the governor or either branch of the legislature, "appear for the State and prosecute or defend, in any "other court, or before any officer, in any cause or "matter, civil or criminal, in which this State may be "a party or interested."

The parties defendant are the United States, its administrative officers charged with the duty of executing the laws

relating to the Indians and their affairs, the Creek Nation and its principal chief, certain Creek Indians as allottees of the lands, certain named citizens of the States of Texas, Illinois, and Missouri as grantees under such original allotments, "and all other allottees of land in the Muskogee or Creek "Nation whose allotments in whole or in part are included "within every alternate section of land or parts thereof "designated by odd numbers to the extent of ten sections per "mile on each side of the Missouri, Kansas and Texas rail-"way and within twenty miles of the line of said road, and "all persons holding under said allottees or any of them."

## II.

### JURISDICTION.

This case is clearly within Federal judicial cognizance as one in equity "arising under this Constitution, the laws "of the United States, and treaties made * * * under "their authority."

Art. III, sec. 2.

Hence by reason of the *subject-matter* the Federal judicial power extends thereto.

The sovereign State is here party plaintiff. Upon the authority of *United States vs. Texas* (143 U. S., 621) and *United States vs. Michigan* (190 U. S., 379) we submit this suit of the State of Kansas against the United States can be maintained in this court under the original jurisdiction clause of the Constitution. The Texas and Michigan cases were suits brought by the United States against those States respectively. The suit now sought to be commenced by the

State of Kansas is the converse, the only difference being that the State is plaintiff and the United States defendant.

The doctrine of the Texas case, and likewise that of the Michigan case, is that the rule that the Government cannot be sued without its consent does not apply to suits between sovereigns.

The Texas case declares (p. 645) the broad ground that "it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent," but immediately adds:

> "The question as to the suability of one government by another government rests upon wholly different grounds. Texas is not called to the bar of this court at the suit of an individual, but at the suit of the government established for the common and equal benefit of the people of all the States. The submission to judicial solution of controversies arising between these two governments,'each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other,' *McCulloch v. State of Maryland,* 4 Wheat., 316, 400, 410, but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty. The States of the Union have agreed, in the Constitution, that the judicial power of the United States shall extend to *all* cases arising under the Constitution, laws and treaties of the United States, without regard to the character of the parties, (excluding, of course, suits against a State by its own citizens or by citizens of other States, or by citizens or subjects of foreign States,) and equally to controversies to which the United States shall be a party, without regard to the subject of such controversies, and that this court may exercise original jurisdiction in all such cases, 'in

> which a State shall be a party,' without excluding those in which the United States may be the opposite party. The exercise, therefore, by this court, of such original jurisdiction in a suit brought by one State against another to determine the boundary line between them, or in a suit brought by the United States against a State to determine the boundary between a Territory of the United States and that State, so far from infringing, in either case, upon the sovereignty, is with the consent of the State sued. Such consent was given by Texas when admitted into the Union upon an equal footing in all respects with the other States."

The fundamental basis for this conclusion is that in *this court* controversies between sovereigns—Federal or State—involving justiciable cause stand for original hearing and judgment in this court.

The Constitution does not in express terms confer upon the United States the power to thus appear as party plaintiff in an original suit in this court against a State. And the dissenting opinion in the Texas case (p. 649) stands broadly upon the express letter of the Constitution in this regard.

When, then, the Constitution is interpreted to confer this right of original action upon the United States, the reasoning which leads to that result manifestly applies in present instance; for in the Texas case the opinion cites with approval the observations of Mr. Justice Story, declaring the sovereign right of the United States to sue in its own courts and denying that such rights must be enforced in the State tribunals.

Indeed, the opinion in the Texas case adds the pertinent suggestion that if the rule were otherwise the United States must therefore sue in one of the courts of Texas. Hence,

upon the very theory of the decision in the Texas case, it is manifest that Kansas, having a justiciable case against the United States, and the Constitution conferring original jurisdiction in all cases arising under the Constitution, laws, and treaties of the United States "in which a State shall be a "party," must of necessity include all cases of such Federal nature wherein the State has justiciable interest. Otherwise the State would be wholly without remedy. If the United States had not sought judicial determination of the controversy with the State of Texas, the State would, in such view, have been without judicial remedy, for the United States would not be suable by the State.

The principle is admirably reasoned in the Texas case. That immunity from suit by the sovereign, except with its consent, applies only in respect of individuals and not to controversies between the sovereigns leads, *ex necessitate,* to the conclusion that in all controversies of a Federal nature, wherein the State is a party, original suit may be brought in this court, summoning to its bar the United States, precisely as under converse conditions the United States may thus summon in the sovereign State.

In other words, the interpretation of the Constitution, which opens the door of original jurisdiction in this court to the United States against the State, must equally operate under converse conditions, or equality of sovereignty in this regard disappears.

The Constitution of the United States is the Constitution of all the States speaking in a united sense, and this court, as the Supreme Court of the United States, is also, in the same sense, the Supreme Court for all the United States, having original jurisdiction in all cases of Federal cognizance "in

which a State shall be a party." The language of the Constitution in this respect is broad and unqualified. Hence, we submit, the door does not here open to the United States against the State and close against the State when the United States is sought to be made defendant.

It is well settled that the sovereignty of the State within its sphere is of the same quality and absolutely equal with the sovereignty of the United States within its sphere. The grant of judicial power under the Constitution extends "to controversies to which the United States shall be a party; to controversies between two or more States," and likewise provides that "in all cases * * * in which a State shall be a party, the Supreme Court shall have original jurisdiction."

A construction of this great instrument which permits the United States to sue a State in this court ought not, we submit, upon plain principle, to be narrowed in order to *exclude* the State, under like conditions, from invoking the same jurisdiction.

Moreover, if the element of express consent by the United States to be thus sued is essential, it may be forcibly suggested that such consent has been given to individuals to thus sue the United States in all cases at law, in equity, or admiralty, not sounding in tort, by the act of March 3, 1887 (24 Stats., p. 505).

The mere circumstance that such suits may be brought in the Court of Claims or, within restricted jurisdictional amounts, in the circuit and district courts does not, we submit, alter the ultimate *fact* that the United States has recognized the principle that in all cases *ex contractu* it may be thus sued. Can it hence be properly said that a State must be driven to these inferior tribunals as party plaintiff against

the United States in the presence of the provision of the Constitution which declares that, in all cases of Federal connizance wherein the State is a party, original suit may be brought in this court? To so rule is to declare that the sovereignty of the State in such a case ranks only with the privilege of the private individual in all suits against the United States. On principle, and with manifest propriety, it may well be urged that recognition of the obligation of the United States to respond as defendant in suits *ex contractu* may well be held to include the suit of the sovereign State in this court where money recovery is so sought in the alternative.

We are well aware of the decision recently rendered in No. 16, original, of present term—the State of Oregon *vs.* Hitchcock, Secretary of the Interior, and Richards, Commissioner of the General Land Office—wherein, upon demurrer, the bill was dismissed. But we submit the decision therein is not here in point, because:

(1.) The only defendants in that case were the United States officials, whereas the Indians were necessary parties, and the decision so holds.

(2.) The bill sought injunctive relief in preventing transfer of the title of the United States to Indian allottees in respect of lands claimed by the State under a prior grant. No money relief was asked, whereas in the present case, in final analysis, the alternative relief here sought against the United States is a money decree if the primary prayer of the bill establishing title in the State is denied.

(3.) In the Oregon case the title to the land was and is still in the United States, and the decision clearly holds that this court will not interfere while the executive branch of the Gov-

ernment is administering the matter—a doctrine fully settled by many prior and cited cases.

The suggestion that the original jurisdiction of this court in respect of suits "in which a State shall be a party" is further limited also to suits where another State is defendant or citizens of another State are defendants is not applicable here, because:

(1.) The jurisdiction arises by reason of subject-matter, as we submit has been clearly shown *supra*.

(2.) Parties are made defendants by the bill, not officers of the United States nor residents of the Indian Territory, but citizens of the States of Texas, Illinois, and Missouri, who are sued by name and as grantees of specific Indian allottees (bill, pp. 2, 14, 15).

Hence the suit is one between the State as plaintiff and citizens of *other* States as defendants.

The brief submitted in behalf of the United States in opposition suggests that the State of Kansas has no substantial interest in the subject-matter and is but nominal complainant, the real party in interest being the railway company, and that "by the terms of the granting act the legal title passed to the "railroad company, if at all, upon the construction of the "road." This contention is based upon section 3 of such granting acts, which provide that as construction of each section of road is certified by the governor of the State patents shall issue to the company for "the land herein granted "within the limits above named."

The cases cited to support such contention demonstrate the *exact contrary*. The grant was to the State "for the use and

"benefit" of the company named therein. *The legal title hence passed to the State,* for under precisely similar state of facts this court, in *Van Wyck vs. Knevals,* 106 U. S., 360, 364, so held as follows:

> "The grant is similar in its main features to "numerous other grants of land made by Congress in "aid of railroads, and contains the same limitations, "or, rather, exceptions to it. It differs from some of "the grants in that it is made to the State, and not "directly to the company to be benefited. The act of "Congress, however, provides, notwithstanding the "designation of the State as grantee, that patents for "the land shall be issued directly to the company "upon the completion of every ten consecutive miles "of the road. The grant is of ten alternate sections, "designated by odd numbers, on each side of the "proposed road, subject to the condition that if it "appear, when the route of the road is 'definitely "'fixed,' that the United States have sold any section "or a part thereof, or the right of pre-emption or "homestead settlement has attached, or the same has "been reserved by the United States for any purpose, "the Secretary of the Interior shall cause an equal "quantity of other lands to be selected from odd sec- "tions nearest those designated, in lieu of the lands "appropriated, which shall be held by the State for "the same purpose. The grant is one *in præsenti,* "except as its operation is affected by that condition; "that is, it imports the transfer, subject to the limita- "tions mentioned, of a present interest in the lands "designated. The difficulty in immediately giving "full operation to it arises from the fact that the "sections designated as granted are incapable of iden- "tification until the route of the road is 'definitely "'fixed.' When that route is thus established the "grant takes effect upon the sections by relation as of

"the date of the act of Congress. In that sense we say "that the grant is one *in præsenti*. It cuts off all "claims, other than those mentioned, to any portion "of the lands from the date of the act, and passes the "title as fully as though the sections had then been "capable of identification. Nor is this operation of "the grant affected by the fact that patents of the "United States are subsequently, upon the certificate of "the governor, to be issued by the Secretary of the "Interior directly to the company and not to the "State. This is only a mode of divesting the State of "her trust character and of passing the legal title held "by her to the party for whose benefit the grant was "made. The legal title under the grant goes to the "State, but the equitable right vests in the company. "The State cannot dispose of the lands; she simply "holds them for the use and benefit of the company, "the act of Congress providing how her trust shall be "discharged and the legal title be conveyed to the "company."

No patent has issued to the railway company, and hence *the legal title* conveyed by the granting act to the State still remains in the State. The State of Kansas is hence the indispensable party complainant and can alone pray the demanded relief.

The case of *Van Wyck vs. Knevals, supra,* is thus direct authority in favor of the proposition that the title to the granted lands is vested in the State of Kansas, for the land grant there construed is in practically the same words as sections 1 and 3 of the land grant of 1866 to the State of Kansas for the use of the M., K. & T. Railway Company. But an examination of the statute will show that the provisions of the law by which the patents were to be issued directly to the company upon certificates of the governor of Kansas have no application to the lands in the Indian Territory.

Section 1 of the act relates only to lands in Kansas. Section 3 provides that when the governor of Kansas shall certify that any section of ten consecutive miles of the road is completed the Secretary of the Interior shall issue to the company patents for so many sections of the land granted within the limits "above named" that is within the limits named in section 1.

Section 9 provides that the "same grant of lands through the Indian Territory are hereby made as provided *in the first section of this act,* whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: *Provided,* That said lands become a part of the public lands of the United States." Nothing is said in the ninth section about the third section.

By section 8 of the act the right of way through the Indian Territory is granted directly to the railway company; but by section 9 the lands are granted (as in section 1 thereof) to the State of Kansas for the purpose of aiding the railway company.

It is manifest that the Secretary of the Interior could not "issue patents to the company" for lands in the Indian Territory merely upon the certificate of the governor of Kansas that ten miles of road had been completed in the Indian Territory. It would be necessary for the Secretary to be informed not only of the fact of completion of the ten miles, but of the extinguishment of the Indian title. As the provisions of section 3 are absolute and unconditional, they cannot reasonably be considered to relate to the grant contained in section 9.

Moreover, it is plain, from an examination of the entire act, that Congress, when it enacted section 3, had in mind mainly the lands situated in the State of Kansas.

Section 11 of the act of July 25, 1866 (bill, p. 27), shows that the railroad was to be built through the Indian Territory upon and after obtaining the written approval of the President of the United States, and that the company, having so commenced the work through the Indian Territory, should prosecute the same in good faith so as to insure its completion through the Territory within a reasonable time, subject to the approval of the President of the United States.

The Department of the Interior, with respect to the lands in the Indian Territory, would, before issuing patents, have required not only evidence of the completion of the road and the fact of the extinguishment of the Indian title, but also the authority of the State of Kansas, by legislation or otherwise, to issue patents to the railway company.

The other cases cited on opposing brief contain nothing to the contrary of the rule so clearly expresed in *Van Wyck vs. Knevals.*

As holder of such legal title in trust for the company, the State has both interest and obligation to thus proceed in protection of the rights of her *cestui que trust.* That the railway company has asserted its rights before various executive officers without the intervention of the State is unimportant here. When resort to judicial relief is compelled and the basis therefor is the enforcement or recognition of the *legal title,* the holder of such legal title is the indispensable complainant. For that plain proposition citation of authority is needless here.

In *U. S. vs. Michigan,* 190 U. S., 379, this court sustained a bill by the United States to enforce a trust created in the State by a grant from Congress made in aid of the construction of a ship canal. As the State of Michigan was held to be accountable as a trustee, it follows that as a trustee it could

maintain a suit in aid of its trust. The rights and obligations must be reciprocal. The State of Kansas was created a trustee by the land-grant act of 1866, chargeable with the obligations of a trustee, and therefore possessing the rights of a trustee in regard to the trust property. She was not a mere "collecting agent," but a trustee in whom the legal title was vested, with full power to institute any and all proceedings necessary to preserve and to maintain that title.

The object of the land grant was to serve purposes of both the United States and the State of Kansas, to open lines of railroad connecting distant parts of the country and to develop and upbuild the country and serve the cause of an advancing civilization. The State is in no sense an intruding volunteer. Nor is the matter in any manner affected by the circumstance that the *cestui que trust* is obligated to indemnify the State for the cost of the proceeding. A trustee holding thus is entitled to be so indemnified by the beneficiary. That is matter of common practice and manifest propriety, in no manner affecting the legal duty of the trustee nor in any possible view affecting the jurisdiction of the court to hear and determine the cause.

The case of *New Hampshire vs. Louisiana,* 108 U. S., 76, cited on opposing brief, is not applicable here. There, by general statute, the State had invited its citizens holding obligations against other States to assign them to the State, and upon deposit of estimated cost of the litigation the attorney general of such assignee State was authorized to bring suit in the name of the State in this court against the debtor State. The purpose of such proceeding was clearly to avoid the effect of the eleventh amendment to the Constitution. The State in such instance had no original interest in the subject-matter, had assumed no original duty as trustee, and

was in no sense an original party to the controversy. The distinction between the case thus cited and the present is so manifest that further comment is unnecessary.

## III.

The suggestion that "it does not appear that all the lands "in controversy have been allotted" is not correct. The bill (pp. 12, 13, and especially 16) shows that "generally speak-"ing all lands within twenty miles of the Missouri, Kansas "and Texas railway *have been allotted.*" It is because of such allotments (which have been practically completed) and the attempted transfer to such allottees of the title of the United States, notwithstanding the prior grant of the same lands to the State, that this bill is now presented. The suggestion of the attorney general would compel a separate suit in respect of each actual allotment, a proceeding condemned by settled equity practice, whereas the bill is presented upon the obvious theory that the United States has in legal effect *accomplished* the wrong complained of and wherefrom relief is sought. Refusal to entertain the cause upon such an objection would, we submit, be most inequitable. Otherwise the State could not present its single bill until the last individual allotment had been made. That could be deferred indefinitely, and when accomplished the plea of laches against the State would as obviously be then interposed. This cause is too important in every view and upon all sides to be now withheld from judgment upon such a strained suggestion.

The final suggestion of opposing brief is directed solely to the *merits* of the cause. No present answer is required. The grave questions involved in this controversy cannot be thus settled in fifteen lines of mere suggestion which ignores all discussion of the meaning and effect of the original grant

*in præsenti* to the State, since fully and seasonably earned, and all reference to the legal effect of the efforts of the grantor to thereafter repudiate the grant and deliberately avoid the contract. Certainly against such wrongs and upon the full recital of all the facts as set forth in the bill the judicial power vested under the Constitution in this court to hear and determine the controversy constitutes the very essence of due process of law. From that inquiry the United States should not shrink nor, we submit, interpose objections which seek to deny all judicial inquiry or remedy here or elsewhere.

There are assumptions in the brief of counsel for the United States which we do not deem it necessary to notice, such as that the State of Kansas has no interest in the subject-matter of this suit and was not interested in the construction of the railroad beyond her boundaries. She was interested in having her railroad connect her with the Indian Territory, Texas, the Gulf of Mexico, and the Republic of Mexico, and she is vitally interested in seeing that justice is done the corporation promoted and organized under her laws and which is one of her citizens, and that her trust obligations under the acts of Congress are enforced for her beneficiaries.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

# SUPREME COURT OF THE UNITED STATES.

**October Term, 1906.**

## No. 11, Original.

The State of Kansas, *Complainant,*

*vs.*

The United States of America, Ethan Allen Hitchcock, *Secretary of the Interior;* Francis E. Leupp, *Commissioner of Indian Affairs;* Tams Bixby, *Commissioner to the Five Civilized Tribes;* J. George Wright, *United States Indian Inspector for the Indian Territory;* Dana H. Kelsey, *United States Indian Agent for the Indians of the Union Agency in the Indian Territory;* The Muskogee or Creek Nation or Tribe of Indians, Pleasant Porter, *Principal Chief of the Muskogee or Creek Nation or Tribe of Indians;* William Fisher and Joseph Fisher, *Citizens and Residents of the State of Texas;* Cornelius L. Bonham, *Citizen and Resident of the State of Illinois;* Michael Fitzpatrick and Jennie C. Fitzpatrick, *Citizens and Residents of the State of Illinois;* George F. Roth, *Citizen and Resident of the State of Illinois;* Samuel Johnson and Elmer Johnson, *Citizens and Residents of the State of Missouri;* John F. Ingram, David Whitlow, George W. Grayson, Napoleon B. Moore, Conny Murphy, David A. Lee, Googan Sarty, James Childres, W. B. Rogers, Alexander L. Posey, Wm. N. Moore, Temiye Kernells, John Jefferson, Henry C.

REED, SAM. GRAYSON, GEORGE MALVERN, JAKE (A. J.) BERRYHILL, WATTEY YAHOLA, GEORGE MARSHALL, ROBERT BRUNER, SARAH A. ASBILL, and JAKE SMITH, *for Themselves and All Other Allottees of Land in the Muskogee or Creek Nation Whose Allotments in Whole or in Part are included within ever alternate section of land or parts thereof designated by odd numbers to the extent of ten sections per mile on each side of the Missouri, Kansas & Texas Railway and within twenty miles of the line of said road, and all persons holding under said allottees or any of them, Defendants.*

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## Brief of Complainant in Opposition to the Motion of Defendants to Dismiss.

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The motion of defendants to dismiss for want of jurisdiction and their brief in support thereof are but a repetition of the printed suggestions which the United States filed in opposition to the motion of complainant for leave to file the bill. The suggestions of the United States in opposition to filing the bill and the printed answer of the complainant thereto were submitted to this court at its last term, and the court, after having considered the same, overruled the suggestions of the United States and directed writs to issue returnable to the October term, 1906, of this court.

While the suggestions were overruled and leave granted the complainant to file the bill and have process thereon, without prejudice, we submit that this court must have meant thereby that it would not pass upon the important jurisdictional questions in this case except upon final hearing. The jurisdictional questions suggested by the defendants in their motion to dismiss are too important to be decided simply upon printed motion and printed briefs, without oral argument and the fullest consideration.

It is a sufficient answer to the motion of defendants to dismiss that the State of Kansas claims by its bill to be the owner of the legal title and to have the right to maintain the suit against all the defendants, including the United States, for the reasons set forth in the bill. This claim cannot be met by a motion to dismiss, but must be met by either plea, answer, or demurrer, for in that way only can the State have an opportunity of a full hearing and consideration upon the merits with the right of oral argument. The State has the right to a hearing of this question upon the merits according to the principles of the rules of equity, which require that the plea, demurrer, or answer be set down for hearing and argument. (See rules governing the equity practice, 31 to 39.)

In *Sparrow v. Strong,* 3 Wall., 105, this court said that it had repeatedly held that, on motion to dismiss, the court will look to the regularity of the writ of error and the fact of the jurisdiction. Other questions must in general await final hearing.

In *Semple v. Hagar,* 4 Wall., 433, this court said:

> "In many cases the question of jurisdiction is so involved with other questions decided in the case, that this court cannot eliminate it without the examination of a voluminous record and passing on the whole merits of the case. In such instances, the court will reserve the question of jurisdiction until the case is heard on the final arguments on the merits."

In *Blythe v. Hinckley,* 180 U. S., 337, this court said, on motion to dismiss for lack of jurisdiction, that the grounds for jurisdiction, if good on their face, though not well founded, were sufficient and could not be inquired into on a motion to dismiss, and the court denied the motion to dismiss for want of jurisdiction.

In *Morning Star v. Cunningham,* 110 Ind., 328, it is held that an answer that, as to some of the plaintiffs, the action ought to abate because they have no interest in the cause of

action, is not a good plea in abatement; that matters of that kind go to the merits and must be determined on final hearing.

In *Ruddock v. Gordon*, Quincy (Mass.), 38, it is held that the want of power in a collector of taxes to maintain an action to recover them is not matter of abatement, but should be tried on the merits. The rule seems to be well established that the incapacity of the plaintiff to sue cannot be raised by motion to dismiss, but by a special plea in abatement. (See American Digest, vol. 1, sections 148 and 154.)

## I.

The first proposition made by the motion to dismiss is that the State of Kansas has no substantial interest in the suit, and therefore cannot be a party plaintiff within the meaning of the Constitution, article III, section 2. Against this proposition we claim that the legal title to the lands granted is by the terms of the granting acts, July 25, 1866 (Bill, pp. 21 to 27, inclusive), and July 26, 1866 (Bill, pp. 28 to 33, inclusive), vested in the State of Kansas for the use and benefit of the Missouri, Kansas and Texas Railway Company by relation from the date of the grant, and that this legal title of the State of Kansas to the granted lands in the Indian Territory has never been divested and is now vested in the State of Kansas.

At page 5 of the brief of defendants in support of their motion to dismiss, it is claimed that "by the terms of the granting act the legal title passed to the railroad company at the date of the grant, or, at least, upon the construction of the road." We claim that the grants were *in præsenti*, to the State of Kansas for the use and benefit of the railway company, effective from the date of the grants, and attached, when the road was constructed, to the particular lands in controversy, and that by the doctrine of relation the legal title of the State dates from the grants.

The bill of complaint, at page 33, states our position as follows:

> "Your oratrix further shows that in the administration of the land grants made to the State of Kansas (for the use and benefit of the Missouri, Kansas & Texas Railway Company) * * * the grants of the lands in place were at all times held to be grants *in præsenti*, conveying the fee simple title as from the date thereof to the State of Kansas as trustee * * * and such construction * * * has been uniformly upheld by the courts of the United States whenever brought in question, and so your oratrix claims and avers that the grant of lands through the Indian Territory, including the Creek Nation, was a grant *in præsenti* of the fee simple title to said granted lands comprising the odd sections within the twenty mile limit on either side of the railroad as located and constructed, to the State of Kansas for the use and benefit of said Missouri, Kansas & Texas Railway Company."

The land grants to the State of Kansas for the use and benefit of the Missouri, Kansas & Texas Railway Company, so far as they have been received and are now claimed, extended from Junction City, on the Kansas Pacific Railway, now Union Pacific Railway, in Geary county, Kansas, to a point on the Kansas and Indian Territory dividing line in Labette county, Kansas; thence across the Indian Territory to the Texas line, near Preston, now Denison, Texas. That part of the road from Emporia to the crossing of the Leavenworth, Lawrence and Fort Gibson Railway, now Atchison, Topeka & Santa Fe Railway, near Chanute, in Neosho county, was received under the act of March 3, 1863, and that part of the line from Emporia north to Junction City under the act of July 1, 1864, and that part from Chanute to the northern line of the Indian Territory, near Chetopa, in Labette county, Kansas, under the act of July 26, 1866.

In Kansas City, Lawrence and South Kansas Railroad Company *v.* The Attorney General, 118 U. S., 682, this

court held that the acts of March 3, 1863, July 1, 1864, and July 26, 1866, were to be construed as one act, and the entire land grants in Kansas to the State of Kansas for the use and benefit of the Missouri, Kansas and Texas Railway Company were comprised in those three acts, construed *in pari materia* as one act. The lands claimed by the State of Kansas in the Indian Territory for the use and benefit of the Missouri, Kansas and Texas Railway Company are claimed under the act of July 25, 1866, and not of July 26, 1866. The motion of defendants seems to misunderstand the claim of the State of Kansas, for it quotes from the act of July 26, 1866, as the origin of the legal title of the State of Kansas, instead of from the act of July 25, 1866. We will explain now, so that the counsel for the defendants and the court may understand the claim of the State of Kansas. It appears from the bill, but not quite as succinctly as from this statement.

At or about the time of the land-grant acts of 1866 there were three Kansas railroad companies running through the State to the Indian Territory line. The first was the Union Pacific Railway Company, Southern branch, since the Missouri, Kansas and Texas Railway Company, extending from Fort Riley, now Junction City, Kansas, in a southeasterly direction, down the valley of the Neosho river, to the southern line of the State of Kansas, near Chetopa, Kansas; the second was the Leavenworth, Lawrence and Fort Gibson Railway Company, since conveyed to the Atchison, Topeka and Santa Fe R. R. Co., extending from Leavenworth, through Lawrence, to the northern line of the Indian Territory, near Coffeyville, Montgomery county, Kansas, in the direction of Galveston bay, in Texas; and the third was the Kansas and Neosho Valley Railway Company, since the Kansas City, Fort Scott and Memphis, and now a part of the St. Louis and San Francisco Railroad Co., extending from a point of connection with the Union Pacific Railroad at or near the mouth of the Kansas river; thence south-

easterly, through the eastern tier of counties, to the northern line of the Indian Territory, at or near Baxter Springs, in Cherokee county, Kansas. The act of July 25, 1866, was entitled,

> "An act granting lands to the State of Kansas to aid in the construction of the Kansas and Neosho Valley Railroad and its extension to Red river."

After granting to the State of Kansas lands in Kansas for the use and benefit of that railroad company (section1), and authorizing it to build across the Indian Territory to the northern line of Texas near Preston, now Denison (section 2), and granting lands through the Indian Territory (sections 8 and 9), that act, in section 11, among other things, provided "that should the Leavenworth, Lawrence and Fort Gibson "Railway Company, or the Union Pacific Railroad Company, "Southern branch (since the Missouri, Kansas and Texas "Railway Company) construct and complete its road to that "point on the southern boundary of the State of Kansas where "the line of said Kansas and Neosho Valley Railroad shall "cross the same, before the said Kansas and Neosho Valley "Railroad Company shall have constructed and completed "its said road to said point, then and in that event the com-"pany so first reaching in completion the said point on the "southern boundary of the State of Kansas shall be author-"ized, upon obtaining the written approval of the President "of the United States, to construct and operate its line of "railroad from said point to a point at or near Preston, in "the State of Texas, with grants of land according to the "provisions of this act, but upon the further special con-"dition, nevertheless, that said railroad company shall have "commenced in good faith the construction thereof before "the said Kansas & Neosho Valley Railroad Company shall "have completed its said railroad to said point: *And pro-"vided further,* That said other railroad company, so having "commenced said work in good faith, shall continue to

" prosecute the same with sufficient energy to insure the com-
" pletion of the same within a reasonable time, subject to
" the approval of the President of the United States."

There was a race between these three companies as to which should first reach the northern line of the Indian Territory, and the Union Pacific Railroad Company, Southern branch, now the Missouri, Kansas and Texas Railway Company, succeeded in the race, obtained the written approval of the President as being entitled to build under said act of Congress across the Indian Territory, and did build across the Indian Territory, and the same was approved by the President of the United States, and the other companies never attempted to build any railroad or thereafter made any claim to the land grants in the Indian Territory provided by said act of July 25, 1866. The history of this race and the action of the Department of the Interior and of the President and Commissioners thereunder are set out in full in the bill, pages 38 to 89, inclusive.

Section 1 of the act of July 25, 1866, grants the lands to the State of Kansas for the use and benefit of the railway company, to the extent of ten sections per mile on each side of the road, and it is a grant *in præsenti*, in that it uses the express terms, "There is hereby granted to the State of Kansas," and, further, if the road was not built in ten years, the lands shall "revert to the United States."

Section 3 of the act provides:

> " * * * When the governor of the State of Kansas shall certify that any section of ten consecutive miles of said road is completed in a good, substantial, and workmanlike manner as a first class railroad, then the said Secretary of the Interior shall issue to the said company patents for so many sections of the lands within the limits above named as are coterminous with said completed section hereinbefore granted; and when certificates of the governor aforesaid shall be presented to said Secretary, of the completion, aforesaid, of each successive section of ten consecutive miles of said road, the said Secretary shall

in like manner issue to said company patents for the land for each of said sections of road as in the first instance, until said road shall be completed: *Provided,* That, if said road is not completed within ten years from the date of the acceptance of the grant hereinbefore made, the lands remaining unpatented shall revert to the United States: *And provided further,* That the said lands shall not, in any manner, be disposed of or incumbered by said company or its assigns, except as the same are patented under the provisions of this act."

Section 8 of the act authorizes and empowers the company extend and construct its railroad from the southern ındary of Kansas south, through the Indian Territory, to d river, at or near Preston, in the State of Texas, so as to ınect with the railway "now being constructed from Galton to a point at or near Preston, in said State."

Section 9 provides:

"*And be it further enacted,* That the same grants of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act. *Provided,* That said lands become a part of the public lands of the United States."

The reason why section 11 of the act of July 25, 1866, nsferred the right to build, under the act, across the lian Territory to that one of the three companies first ching the Indian Territory line was that the Indian naıs had only granted a right of way to one road, which uld be authorized by Congress to construct a railroad from y point north to any point south through said nations. ee Bill, pp. 34 and 35, and specially article V of the Creek aty with the United States, approved by the Senate July 1866; signed by the delegates of the Creek nation July

23, 1866, and proclaimed by the President August 11, 1866; Bill, pp. 170, 171, 178, 179, 180, 181.)

And, further, Congress did not intend to multiply land grants in the Indian Territory, but to confine the north and south line to one company.

The act of July 26, 1866, was entitled:

> "An act granting Lands to the State of Kansas to aid in the construction of a Southern Branch of the Union Pacific Railway and Telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas."

These two acts were passed only a day apart, and the language is the same in each, except as to the routes.

Section 1 of the act of July 26, 1866 (Bill, pp. 28 to 33, inclusive) granted lands in the State of Kansas for the use and benefit of the Union Pacific Railroad Company, Southern branch, since Missouri, Kansas and Texas Railway Company, through the State of Kansas.

Section 8 authorized the extension from the southern boundary of Kansas south through the Indian Territory, along the valley of the Grand and Arkansas rivers, to Fort Smith, in the State of Arkansas.

Section 9 is as follows:

> "*And be it further enacted*, That the same grant of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted by the first section of this act: *Provided*, That said lands shall become part of the public lands of the United States."

Section 11 of both the acts of July 25 and July 26, 1866, provided that the company might connect, unite, and consolidate with any other railroad company, after the same shall be located in the valley of the Neosho or Grand river, upon just, fair, and equitable terms to be agreed upon be-

tween the parties, and shall not be against the public interest or the interest of the United States (Bill, pp. 26 to 33, inclusive), thus showing that there was in contemplation one line through the Indian Territory.

The object of the land grants of Congress to the State of Kansas, referred to in the bill as the acts of March 3, 1863, July 1, 1864, July 25, 1866, and July 26, 1866, was to serve the high purposes of both the United States and the State of Kansas; and these land-grant acts were not only grants, but also laws. The parties to the grants were the United States, the State of Kansas as trustee for the use and benefit of the railway company, and the railway company itself. The specific object of the United States was to have railroads built, extending through Kansas and thence across the Indian Territory, connecting with the Union Pacific Railroad system, which was then building from Kansas City, Missouri, and Omaha, Nebraska, westward across the continent, and to secure a military and post route to transport its troops, munitions of war, supplies, and public stores free (Bill, sec. 3, p. 23), and its mails for such compensation as Congress might by law provide (Bill, sec. 5, p. 24). It also undoubtedly had in view the general development of the country. The State of Kansas had a like public object in having railroads built, to develop the State, and to have its railroads extend beyond the limits of the State, connecting the State with other States in distant parts of the country, to cross the Indian Territory, reach Texas and the Gulf of Mexico at Galveston, and the Republic of Mexico, in the southwestern part of the continent. The United States selected the State of Kansas as the trustee to hold the title to the land grants; the State of Kansas accepted the trust, and the company availed itself of the land grants by building the railroads. How idle and senseless, therefore, is the suggestion, in the brief of counsel for the defendants, that it was not competent for Kansas to be a trustee except for railroads lying within the limits of the State. It is too firmly settled to be questioned, that the

United States and each one of the separate States may sustain the character of trustee, and that they have the legal capacities to take and execute trusts for every purpose.

Perry on Trusts, sec. 41.
McDonald *v.* Murdock, 15 How., 400.
U. S. *v.* Michigan, 190 U. S., 379.
Van Wyck *v.* Knevals, 106 U. S., 360, *et seq.*

The Federal Government is now trustee in the will of James Smithson in behalf of the Smithsonian Institute. Nearly all of the States are trustees of lands for educational purposes. In nearly if not all of the States and Territories wherein lands have been granted in aid of railroad companies the State has been made by the United States the trustee of the lands granted for the use and benefit of the railroad companies. In the case at bar it is the duty of the State of Kansas, as trustee for the railway company, to defend, uphold, and protect the title which was granted to it and see that the lands go to the beneficiary of the trust. The brief of defendants, evidently relying very slightly on the inability of Kansas to be the trustee, claims that by the terms of section 3 of the act of July 25, 1866, the legal title passed to the railroad company upon the construction of the road. Section 1 of the act relates to lands in Kansas. Section 3 provides that when the governor of Kansas shall certify that any section of ten consecutive miles of the road is completed the Secretary of the Interior shall issue to the company patents for so many sections of the land granted within the limits "above named"—that is, within the limits named in section 1.

Section 9 provides that the "same grant of lands through the Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: *Provided*, That said lands become a part of the public lands of the

United States." Nothing is said in the ninth section about the third section.

By section 8 of the act the right of way through the Indian Territory is granted directly to the railway company; but by section 9 the lands are granted (as in section 1 thereof) to the State of Kansas for the purpose of aiding the railway company.

It is manifest that the Secretary of the Interior could not "issue patents to the company" for lands in the Indian Territory merely upon the certificate of the governor of Kansas that ten miles of road had been completed in the Indian Territory. It would be necessary for the Secretary to be informed not only of the fact of completion of the ten miles, but of the extinguishment of the Indian title. As the provisions of section 3 are absolute and unconditional, they cannot reasonably be considered to relate to the grant contained in section 9.

Moreover, it is plain, from an examination of the entire act, that Congress, when it enacted section 3, had in mind the lands situated in the State of Kansas.

However, if section 3 should be held to apply to the grant of lands in the Indian Territory provided for in section 9, it does not in any way affect the proposition that by section 1 and section 9 the legal title to the lands in the Indian Territory passed by the grant to the State of Kansas for the use and benefit of the railway company, and that legal title has never passed out of the State of Kansas.

It was expressly ruled in Van Wyck *v.* Knevals, 106 U. S., 360, that the legal title passed to the State under a precisely similar statute, and was a grant *in præsenti*, and that section 3 was not necessary to pass the title to the State, for it passed by granting clauses of section 1. Section 3 was simply the means provided for passing the legal title from the State to the railway company and to identify and more clearly attach the grants to the specific lands.

The ruling in Van Wyck *v.* Knevals was as follows (p. 364):

> "The grant is similar in its main features to numerous other grants of land made by Congress in aid of railroads, and contains the same limitations, or, rather, exceptions to it. It differs from some of the grants in that it is made to the State, and not directly to the company to be benefited. The act of Congress, however, provides, notwithstanding the designation of the State as grantee, that patents for the land shall be issued directly to the company upon the completion of every ten consecutive miles of the road. The grant is of ten alternate sections, designated by odd numbers, on each side of the proposed road, subject to the condition that if it appear, when the route of the road is 'definitely fixed,' that the United States have sold any section or a part thereof, or the right of pre-emption or homestead settlement has attached, or the same has been reserved by the United States for any purpose, the Secretary of the Interior shall cause an equal quantity of other lands to be selected from odd sections nearest those designated, in lieu of the lands appropriated, which shall be held by the State for the same purpose. The grant is one *in præsenti*, except as its operation is affected by that condition; that is, it imports the transfer, subject to the limitations mentioned, of a present interest in the lands designated. The difficulty in immediately giving full operation to it arises from the fact that the sections designated as granted are incapable of identification until the route of the road is 'definitely fixed.' When that route is thus established the grant takes effect upon the sections by relation as of the date of the act of Congress. In that sense we say that the grant is one *in præsenti*. It cuts off all claims other than those mentioned, to any portion of the lands from the date of the act, and passes the title as fully as though the sections had then been capable of identification. Nor is this operation of the grant affected by the fact that patents of the United States are subsequently, upon the certificate of the governor, to be issued by the Secretary of

> the Interior directly to the company and not to the State. This is only a mode of divesting the State of her trust character and of passing the legal title held by her to the party for whose benefit the grant was made. The legal title under the grant goes to the State, but the equitable right vests in the company. The State cannot dispose of the lands; she simply holds them for the use and benefit of the company, the act of Congress providing how her trust shall be discharged and the legal title be conveyed to the company."

No patent has issued to the railway company, and hence the legal title conveyed by the granting act to the State still remains in the State. The State of Kansas is hence the indispensable party complainant and can pray the demanded relief.

The case of Van Wyck *v.* Knevals, *supra*, is thus direct authority in favor of the proposition that the title to the granted lands is vested in the State of Kansas, for the land grant there construed is in practically the same words as sections 1 and 3 of the land grant of 1866 to the State of Kansas for the use of the railway company.

In St. Paul & Pacific R. R. Co. *v.* Northern Pacific R. R. Co., 139 U. S., 1, the words "that there be and hereby is granted to the Northern Pacific Railroad Company" was held to be a grant *in præsenti*, and passed the title direct to the railroad company, although by the fourth section of that act of Congress it was provided that patents should be issued to the company as the road was constructed in 25-mile sections. This is a very strong case in our favor, as the court observed that it was necessary to place that construction upon such acts in order to carry out the purposes of the Government, "and to secure the company against any attempted alienation of the land to other parties."

Among other things, the court said (pp. 5, 6, 7):

"As seen by the terms of the third section of the act, the grant is one *in præsenti;* that is, it purports to pass a present title to the lands designated by alternate sections, subject to such exceptions and reservations as may arise from sale, grant, pre-emption or other disposition previous to the time the definite route of the road is fixed. The language of the statute is 'that there be, and hereby is, granted' to the company every alternate section of the lands designated, which implies that the property itself is passed, not any special or limited interest in it. The words also import a transfer of a present title, not a promise to transfer one in the future.

"The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but when once identified the title attached to them as of the date of the grant, except as to such sections as were specifically reserved. It is in this sense that the grant is termed one *in præsenti;* that is to say it is of that character as to all lands within the terms of the grant, and not reserved from it at the time of the definite location of the route.

"This is the construction given to similar grants by this court, where the question has been often considered; indeed, it is so well settled as to be no longer open to discussion (Schulenberg *v.* Harriman, 21 Wall., 44, 60; Leavenworth, Lawrence, etc., Railroad Co. *v.* United States, 92 U. S., 733; Missouri, Kansas, etc., Railway Co. *v.* Kansas Pacific Railway Co., 97 U. S., 491; Railroad Co. *v.* Baldwin, 103 U. S., 426). The terms of present grant are in some cases qualified by other portions of the granting act, as in the case of Rice *v.* Railroad Co., 1 Black, 358; but unless qualified they are to receive the interpretation mentioned.

"It is contended that they are qualified, and restricted by the provision of the fourth section that whenever twenty-five miles of the road are completed in a good, substantial, and workmanlike manner, and the commissioners appointed to examine the same have made a report to that effect to the President, patents shall be issued 'confirming to said company the right and title to said lands, situated opposite to and

coterminous with, said completed section of said road.' This provision, it is urged, is inconsistent with the theory that a title to the lands had previously vested in the company. We do not think so. There are many reasons why patents should be issued upon the completion of each section of the road. They would not only identify the lands as coterminous with the completed section but they would be evidence that, as to that portion of the road, the conditions of the grant had been complied with, and that it was thus freed from any liability to forfeiture for a disregard of them. They would also obviate the necessity of any further evidence of the grantee's title. As deed of further assurance they would thus be of great value in giving quiet and peace to the grantee's possession. There are many instances in the legislation of Congress where patents are authorized to be issued to parties in further assurance of their title, notwithstanding a previous legislative grant to them or a legislative confirmation of a previously existing claim. The previous grant or confirmation is in no respect impaired thereby, or its construction affected. (See on this point Langdeau *v.* Hanes, 21 Wall., 521; Wright *v.* Roseberry, 121 U. S., 488, 497.)

"Although the restraints in the act against the sale or alienation of the lands when once identified are not the subject of consideration in the present case, it may be well, to obviate misapprehension, to observe that the company, notwithstanding its possession of the title, was not at liberty to dispose of the lands without the consent of Congress, except as each twenty-five mile section was completed and accepted by the President, so as to deprive the United States of the right to compel their application to the purposes of the grant, or so as to prevent their forfeiture in case of the company's failure to comply with its conditions. Congress in allowing a mortgage upon the land, and in other ways, may have granted permission to the company to use and dispose of the lands or a portion thereof, but with this we are not now concerned. The construction we give to the granting terms of the act, as qualified by subsequent provisions, not only secures the application of the

> property to the construction of the road and telegraph line, and thus carries out the purposes of the Government, but also secures the company against any attempted alienation of the land to other parties."

There is no federal statute of uses, nor is there any federal common law. The lands in question are not situated in Kansas or any other State. Under the decisions of the courts, both English and American, the statute of uses was never held to execute the trust or pass the legal title to the *cestui que trust* where the trust created was such that it was necessary that the trustee should continue to hold the legal title in order to carry out and effectuate the purposes of the trust. The statute of uses has never been considered to execute the trust where the trust was created for the express purpose of preserving a contingent remainder.

Perry on Trusts, sections 305 and 309.
Biscoe *v.* Perkins, 1 Ves. & B., 485.
Barker *v.* Greenwood, 4 M. & W., 431.
Vanderheyden *v.* Crandall, 2 Denio., 9.
Laurens *v.* Jenney, 1 Spears, 365; Co. Litt., 265 a. 2, 337 a. n. 2.

In the case at bar the Government was the owner in fee simple of the lands in question. It granted to the Indian tribes a communal tribal interest for and during such time as they should live upon it in common as a tribe. The fee was granted to the State of Kansas in trust, to preserve it for the railway company when the conditions as specified in the act of Congress should be fulfilled. The question whether or not the conditions have been performed upon which the railway company is entitled to the lands and to have the trust executed and the legal title vested in it is a question for the court. If this court shall decide, or if counsel for the Government will consent that the court enter a judgment finding and adjudging that the conditions have been performed, then the railway com-

pany, as *cestui que trust*, may become absolutely entitled to the beneficial interest in the trust estate. In section 520, Perry on Trusts, cited by counsel for the Government, it is said that, even as applied to a simple or dry trustee, it is his duty to protect and defend the title, or to allow his name to be used for that purpose, and that at law he is the legal owner of the estate and his name must be used in all suits at law affecting the legal title, and the author, in the same section, further says that in these simple or dry trusts the beneficiary cannot call for a conveyance if the conveyance is inconsistent with all the agreements or purposes of the trust.

The act of July 25, 1866, was not only a grant of the lands to the State of Kansas, but it is also a law, and the only law of this case, and that law, as gathered from the four corners of the act of Congress, governs the grant, and not the technical rules of the common law nor the statute of uses.

That the statute is not only a grant, but the law of the case, see—

Schulenberg *v.* Harriman, 21 Wall., 44.

And in *Missouri, Kansas & Texas Railway Company v. Kansas Pacific Railway Company* (97 U. S., 491, 497) it was said:

> "It is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. That intent should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties. To the validity of such transfers it may be admitted that there must exist a present power of identification of the land; and that where no such power exists, instruments, with words of present grant, are operative, if at all, only as contracts to convey. But the rules of the common law must yield in this, as in all other cases, to the legislative will."

That the provisions of section 3, even though they apply to the lands in the Indian Territory, in no way affect the grant to the State, is determined by—

Van Wyck *v.* Knevals, 106 U. S., 360-364.
St. Paul & Pac. R. R. *v.* Northern Pac. R. R., 139 U. S., 1.
Langdeau *v.* Hanes, 21 Wal., 521.
Wright *v.* Roseberry, 121 U. S., 488.

Counsel for defendants go outside of the record to assert, on page 6 of their brief, that in a mortgage dated November 14, 1868, on file in the General Land Office, a recital is made that the State of Kansas accepted said grant from Congress and regranted the same to the party of the first part. There is no reference to this mortgage in the bill, and it is not and cannot now be before the court. If the court is to send out and examine that record, it will find that the recitals in the mortgage in no way make any statement that the lands granted in the Indian Territory have been regranted by the State to the railway company. There never has been any regrant of them. At the time the mortgage was made it had not been determined that the Missouri, Kansas and Texas Railway Company, formerly Union Pacific Railroad Company, Southern branch, was entitled to build across the Indian Territory under the act of July 25, 1866, for at that time it had not reached the southern boundary line of Kansas, and it had not been decided by the President that it was the company entitled to build the railroad. The only way that the legal title could be gotten out of the State of Kansas would be either by a direct conveyance by the State to the railway company or by patents of the Secretary of the Interior to the railway company based on the certificate of the governor of Kansas, or perhaps the decision of the President, that the railroad had been constructed as provided by the act. The whole bill shows that patents have never been granted by the Secretary of the Interior, because the United

States denies the right of the State of Kansas or the railway company to the lands in the Indian Territory. In order to establish that the lands granted to the State of Kansas have been regranted to the railway company, it would have to affirmatively show that either this conveyance by the State had been made or that the Secretary of the Interior, on the faith of the governor's certificate, or the President's decision, had patented the lands direct to the railway company. The State of Kansas avers, speaking for the State and for the governor of the State and the authorities of the State, that the road was built through the Indian Territory within the time and in conformity with the requirements of the statute and approved by the President of the United States, and that notwithstanding, the claim of the State of Kansas to the legal title and of the railway company to the beneficial title has been denied and ignored by the United States, and that the United States has sought to convey this title to others than the State of Kansas or the railway company.

The case of Rice *v.* R. R. Co., 1st Black, 358, is cited as an authority in support of the Government's contention that the State of Kansas acquired nothing under the act of Congress but a mere naked trust or power to dispose of the lands in the manner therein specified, and that Congress could at any time after the passage of the act have repealed the same, and we believe the further proposition is insidiously asserted that Congress has the power, directly or indirectly, to repeal the act.

An examination of the case of Rice *v.* R. R. Co. shows that there are no facts in common between that case and the case at bar, but the case is really a strong authority in support of complainant's right to maintain its bill as applied to the facts of this case. In the Rice case the railroad company was incorporated by the territorial legislature of Minnesota on the 4th day of March, 1854, with power to construct a railroad from the northern line of the State of Iowa to Lake Superior. The territorial charter also provided "that

all such lands and privileges belonging, or which may hereafter belong to the Territory or future State of Minnesota on or within said 200 feet in width, are hereby granted to said corporation for said purposes, and for no other, and for the purpose of aiding said company in the construction and maintaining of said railroad, it is further enacted that any lands which may be granted to the said Territory to aid in the construction of said railroad are, and the same are hereby granted in fee simple absolute, without any further act or deed."

Congress, on the 29th day of June, 1854, passed an act entitled "An act to aid the Territory of Minnesota in the construction of a railroad therein," and among other things granted lands to the Territory of Minnesota to aid in the construction of a line of railroad from the southern line of said territory; thence, by way of St. Paul, to the eastern line of said Territory, in the direction of Lake Superior, but by the provisions of said act of Congress the benefits thereof were not to inure to the benefit of any company theretofore constituted and organized, and by section 4 of the act it was provided that no title should vest in the Territory of Minnesota, nor should any patent issue for any part of the lands until a continuous line of twenty miles of road should be completed.

Afterwards, on the 16th day of February, 1855, the Territory of Minnesota made some modifications and amendments to the charter of the railroad company and re-enacted it. The railroad company located its line across a tract of land claimed by the plaintiff, and which the plaintiff purchased from the Government on the 1st of January, 1856. The trespass complained of was the going on part of the land claimed by the plaintiff and cutting timber for the purpose of constructing the road. The railroad claimed title to the land in question by virtue of the act of the Territory of Minnesota granting to it any lands which Congress might thereafter grant to the Territory of Minnesota. The Su-

preme Court held that the territorial act, attempting to grant the title to land the fee to which was not then vested in it, was inoperative and void, and further held that the act of Congress did not inure to the benefit of the defendant railway company, because it was organized before the passage of the act; and that inasmuch as the act specifically provided that title should not vest in the Territory of Minnesota until a continuous line of twenty miles of railroad should be built, no such vested interest passed to the Territory of Minnesota, and that Congress could, intervening the construction of any railroad entitled to the benefits of the act, repeal the act. The court expressly held that the granting words were sufficient to vest in the Territory a beneficial interest in the lands granted except for the qualifying provisions in the act. The court said:

> "Undoubtedly the words employed are sufficient to have that effect (vest in the Territory a beneficial interest) and if not limited or restricted by the context of other parts of the act, they would probably receive that construction."

To the suggestion of the defendant railroad company that if the views of the plaintiff be adopted by the court, the same rule would apply to all the grants made by Congress to the States and other Territories, the court said:

> "Of course, the suggestion is correct if such other grants are made in the same terms and are subject to the same limitations, restrictions and prohibitions, but we have looked into that subject and think it proper to say that we see no foundation whatever for the suggestion."

In the act of July 25, 1866, now before this court, the grant to the State of Kansas was made *in præsenti*, without reservation, restriction, or limitation, and, as stated by Mr. Justice Clifford, who wrote the opinion of the court, "Undoubtedly the words employed are sufficient to have that

effect if not limited or restricted by the context or other parts of the act, and they should properly receive that construction." On the facts of our case, we contend that this is a strong authority in support of the bill.

Counsel for the Government admit and cite authorities to the effect that a conveyance to trustees for certain purposes carried the legal estate to the beneficiaries "unless there are duties imposed on the trustees, the performance of which requires the legal estate to be vested in them in which they would take an estate commensurate with the exigencies of their trust." We respectfully submit the exigencies of this situation clearly require the vestings of the estate in a trustee, pending the performance of things required by the acts of Congress. It would certainly be preposterous to contend that a conveyance to a trustee for the benefit of a person upon condition vests title in the beneficiary before condition performed.

In this connection certain statutes of Kansas, as well as decisions of the Supreme Court of Kansas, are also cited. It has been decided by this court that rules of decision in cases within the 34th section of the judiciary act were derived from the laws of the States, but in the construction of the laws of Congress, the rules of the common law furnish the true guide (Charles River Bridge *v.* Warren Bridge, 11th Peters, 345).

In the case of Sioux City, etc., R. R. *v.* U. S., 159 U. S., 349, relied upon by counsel for defendants as supporting the proposition that in the case at bar the title to the lands is in the railway company and not in the State of Kansas, the facts were: Congress, by an act approved May 12, 1864, granted certain lands to the State of Iowa in aid of the construction of railroads in that State (13 Stat. at Large, 872). The aid was granted for the construction of two railroads, one from Sioux City to the south line of Minnesota, and the other for a railroad extending from South McGregor, Iowa, in a westerly direction. The act provided that "the lands hereby granted should be disposed of by said State

for the purposes aforesaid only, and in manner following, namely, when the governor of said State has certified to the Secretary of the Interior that any section of ten consecutive miles of either of said roads is completed in a good, substantial and workmanlike manner, as a first-class railroad, then the Secretary of the Interior shall issue to the State patents for one hundred sections of land for the benefit of the road having completed the ten consecutive miles, as aforesaid;" and the said act provided that if the road was not completed within ten years the said lands hereby granted and not patented shall revert to the State of Iowa for the purpose of securing the completion of the roads within such time, not to exceed five years; and provided further that said lands should not be disposed of or encumbered in any manner except as the same were patented under the provisions of the act, and that if the State should fail to complete said road within five years after the ten years, then the lands undisposed of should revert to the United States.

By an act of the legislature of the State of Iowa approved April 20, 1866, it was provided that the lands, powers, duties, and trusts conferred by the act of Congress of July 12, 1864, were accepted by the State, and that "whenever any lands shall be patented to the State of Iowa, in accordance with the provisions of said act of Congress, said lands shall be held by the State, in trust, for the benefit of the railroad company entitled to the same, by virtue of said act of Congress, and be deeded to said railroad company, as shall be ordered by the legislature of the State of Iowa."

The Sioux City Railroad Company constructed its line from the southern boundary line of Minnesota, in the direction of Sioux City, a distance of 56.13 miles. The governor certified to the Secretary of the Interior the completion of the five 10-mile sections of the road, and the Secretary of the Interior issued patents to the State of Iowa for 407,910 acres, whereas patents should only have been issued for 320,000 acres, and the State in turn conveyed to the company 322,412

acres, and subsequently the legislature of Iowa passed an act directing the governor to certify to the Sioux City Railway Company, in accordance with the provisions of the act of its legislature of April 20, 1866, "any and all lands then held in trust for its benefit," but the remaining 85,457 acres, which had been patented by the Secretary of the Interior to the State, were never in fact conveyed by the State to the railroad company, as the railroad company had never constructed the additional mileage calling for the same. The Sioux City Company did not complete its line to Sioux City and the legislature of Iowa passed an act on March 15, 1882, declaring that all lands granted or intended to be granted to the Sioux City Company by the act of Congress, or by the acts of the legislature of Iowa, which had not been earned, "be and the same are hereby absolutely and entirely resumed by the State of Iowa," and on the 27th of March, 1884, the State of Iowa passed another act by which it relinquished and conveyed to the United States all lands resumed and intended to be resumed by the act of March 16, 1882.

Suit was brought by the United States against the Sioux City road, pursuant to the act of Congress of March 3, 1887, for the adjustment of land grants in aid of the construction of railroads and for the forfeiture of unearned lands. The Sioux City Company, while admitting that it had not completed its railroad, contended that it had not received the full quota of lands to which it was entitled for the line actually constructed, inasmuch as there were certain deficiencies in some of the sections along the constructed line.

Upon this state of facts the court held, that as the lands granted to the State could only be devoted to the construction of the railroad provided for in the act, the State held the legal title in trust for that purpose, and that as to the undisposed of lands, while the legal title was in the State, the Government was equitably entitled thereto. The railroad company contended that under the act of Congress granting the lands to the State, as well as under the patents of the

Government to the State, the legal title passed directly to the railroad company, and that the lands were thereby free from restraints of alienation, from conditions subsequent, or from liability to forfeiture; but this court held that neither the act of Congress granting the lands to the State in trust, nor the patents, carried any title directly to the railway company, but that the legal title remained in the State on and for the specific trust specified in the act of Congress, and that until the State disposed of the lands, the title was in it as trustee, and not in the railroad company; citing Schulenberg *v.* Harriman, 21 Wal., 44; Lake Superior Ship Canal, etc., Co. *v.* Cunningham, 155 U. S., 372; McGregor, etc., R. R. *v.* Brown, 39 Iowa, 655, and Sioux City & St. Paul R. R. *v.* Osceola County, 43 Iowa, 318.

We respectfully submit that this case, instead of supporting the contention of counsel for the Government, is a clear authority against the proposition that the legal title to the lands in question is in the railroad company and not in the State of Kansas. There has been no patent issued by the Government to the railroad company nor conveyances made by the State of Kansas to the railroad company. The title is now where it was placed by the act of Congress of July 25, 1866, in the State of Kansas.

The case of *Webster v. Cooper*, 14 Howard, 488, cited on page 5 of the brief of counsel for the Government in support of the proposition that conveyance to trustees for certain purposes or uses carries the legal title to the beneficiaries, is the construction of a will in which the testator devised certain lands to trustees and their heirs to the use of Richard Vassall for life, remainder for his life, in case of forfeiture, to the trustees to preserve contingent remainders; remainder to the sons of Richard Vassall, if any, as tenants in common in tail, with cross-remainders; remainder to Richard Vassall's daughter Elizabeth for life, remainder to trustees to preserve contingent remainders during her life; remainder to the sons of Elizabeth Vassall in tail. The court held that the rule in

Shelly's case was not applicable to the devise in question, but that it was plain from the terms of the will that it was not intended that the trustees should hold the fee, because there were express limitations of life estates to them to preserve contingent remainders, which would have been wholly inoperative if they took the fee.

The facts in the case were these: Florentius Vassall by his will devised certain lands to three trustees upon the trusts and for the uses above stated. The plaintiff claimed under the following provision of the will: "and from and immediately after the decease of said Elizabeth Vassall to the one or all and every the son and sons of the said Elizabeth Vassall," the question being whether, by force of the will, the plaintiff, being a son of Elizabeth Vassall, took any, and if any, what legal estate in the lands on the decease of his mother, Elizabeth Vassall, it being contended by the defendant that the trustees took the legal title in fee simple, and that the estates limited to Richard Vassall for life and to the others by way of remainders were only equitable estates, and consequently the plaintiff could not maintain the action. The court simply ruled that the legal estate was not vested in the trustees, but in the beneficiaries named in the will. We fail to see in what particular or particulars this case has any bearing on the questions before this court.

In *Schulenberg and others v. Harriman,* 21 Wallace, 44, it was held that under the act of Congress approved June 3, 1856, entitled, "An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State" (11 Statutes at Large, 20), that the grant was *in præsenti* and passed title to the odd sections, to be afterwards located, to the State, and when the route of the road was subsequently located, the title acquired precision and attached to the land. The act provided that if the road should not be constructed within ten years, no further sale should be made and the lands unsold should revert to the United States. The State accepted the grant and assumed the execution of the trust.

It further appears that after the granting of the lands to the State of Wisconsin the State passed an act accepting the grant and, in the words of the court, "assumed the execution of the trust," and that the legislature of Wisconsin passed an act transferring the title to the lands covered by the act to the St. Croix and Superior Railroad Company, in which act it was provided that on the construction and completion of every twenty miles of railway the said company should acquire the fee simple absolute in and to that portion of the lands granted to the State by act of Congress, appertaining to the portion of the railway so constructed. The plaintiff cut a lot of logs off of the lands in question, and the agent of the State seized the logs on the ground that the title to the lands and the logs was in the State.

The court further held that unless there were clauses in the statute restraining the operation of words of present grant they must be taken in their natural sense to import an immediate transfer of the title, although subsequent proceedings may be required to give precision to that title and attach it to specific tracts. It was contended in the argument of the case that under the decision of Rice *v.* R. R. Co. 1 Black, 358, 376, title did not pass to the State. The route of the road was surveyed and a map showing location filed at Washington, but the railroad was never actually constructed. Mr. Justice Field wrote the opinion of the court, and held that the words "that there be and is hereby granted to the State of Wisconsin" passed a present estate, and that this interpretation was much strengthened by the third section, where it was declared that the lands "hereby granted to said State shall be subject to the disposal of the legislature thereof," and the fourth section, which provided that if the road was not completed within ten years, no further sales should be made, "and the lands unsold shall revert to the United States;" and that these phrases implied what the first section in terms declares, that the grant is made, that is, that the title was transferred to the State. Justice Field

further said that the decisions fairly established the conclusion that unless there are other clauses in the statute restraining the operation of words of present grant, they must be taken in their natural sense to import an immediate transfer of title, and pointed out the distinction between such grants and mere conveyances at common law between individuals, observing that a grant from one individual to another of lands to be afterwards designated was a mere contract to convey, but that a legislative grant operates as a law as well as a transfer of the property. He distinguished the case of Rice *v.* R. R. Co. on the ground that the words of present grant in the first section were restrained by the provision in the subsequent section declaring that the title should not vest in the Territory of Minnesota until the road or portions of it were built.

In U. S. *v.* Southern Pacific Ry. Co., 146 U. S., 570, the court held that the words "there be and hereby is granted" operated as a grant *in præsenti*, citing St. Paul & Pacific R. R. Co. *v.* Northern Pacific R. R. Co., 139 U. S., 1; Schulenberg *v.* Harriman, 21 Wallace, 44; Leavenworth, Lawrence, etc., R. R. Co. *v.* United States, 92 U. S., 733; Missouri, Kansas, etc., R. R. Co. *v.* Kansas Pacific R. R. Co., 97 U. S., 491; R. R. Co. *v.* Baldwin, 103 U. S., 426.

In *Van Wyck v. Knevals*, 106 U. S., 360, *et seq.*, it was held that under an act of Congress granting lands in Kansas and Nebraska to the State of Kansas in trust for a Kansas railway company, the State took the legal title to the lands in Nebraska as well as in Kansas; and this case clearly settles the proposition that it was competent for the State to be a trustee and hold the legal title to lands beyond the limits of Kansas, and also that Congress intended by the act of July 25, 1866, under which the State of Kansas claims in this case, to vest the legal title in the State to the granted lands in the Indian Territory. The act of Congress construed in the Van Wyck case was passed by the same Congress and in the same month at the act of July 25, 1866. As

at the time of the passage of the act of July 25, 1866, it was uncertain which of the three roads named in section 11 of the act would first construct its line to the southern boundary line of the State of Kansas, it is manifestly absurd to contend that the land grant was direct to any one or all three of the companies named, but the grant was one *in præsenti* to the State of Kansas for the use and benefit of the railroad company which should first construct its line to the southern boundary line of the State of Kansas and secure the written approval of the President of the United States to construct and operate its line through the Indian Territory. That it was a grant to the State of Kansas there can be no question, for in no other way could the purpose and intention of Congress be carried out. No one of these railway companies contending for the prize of the land grant through the Indian Territory would have constructed its line from the State of Kansas through the Indian Territory on the bare promise that Congress would afterwards make the grant to the State of Kansas for its benefit. The title to the lands granted through the Indian Territory could not be suspended. The title, after the passage of the act, was either in the Government or in the State of Kansas. The title did not and could not have passed to any one of the railroad companies, because it was not known and could not be known for some time afterwards which one would become entitled to it. There was no organized territorial government in the Indian Territory in which the title could have vested as trustee.

## II.

In reply to the brief of counsel for the defendants on their motion to dismiss, on the ground that this court has no jurisdiction of the defendants, we submit:

First. That this is a case where the State is a party plaintiff, and the suit is a case in equity arising under the Constitution of the United States, the laws of the United States, and

treaties made. The subject-matter of the suit is the title to lands, which originates exclusively under an act of Congress, and also under treaties made between the United States and the Creek nation. The State of Kansas claims to have the legal title to the lands by direct grant from the United States. The beneficiary of the trust, the railway company, has done everything required by the act of Congress. The defendants claim, as affirmatively shown by the bill, that the lands in question have been granted by the United States, since the grant to the State of Kansas, by certain treaties made between the United States and the Creek nation and certain laws of the United States, to individual allottees, to whom deeds or patents have been made by the United States and the Creek nation. The suit is one of conflicting titles, each party claiming under the Constitution, laws, and treaties of the United States. The case of *Minnesota v. Hitchcock,* 185 U. S., 373, is not an authority against the right to bring this suit under section 2, article III, of the Constitution of the United States, but, by clear implication, is a decision in favor of the right to bring the suit. This court, in the Minnesota case, based the jurisdiction upon that suit being against the United States, but it clearly said, on page 383, that jurisdiction did exist in all cases at law and in equity arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority, where a State was a party, and in that part of the opinion quoted at page 13 of the brief of counsel for defendants the court added the following significant sentence, which the brief of counsel omits, and which is necessary to a full understanding of what is quoted:

> "To this it may be replied that this court cannot deny its jurisdiction in a case to which it is extended by the Constitution."

Instead of deciding, in the Minnesota case, that the court could not entertain jurisdiction because it was not a suit arising under the Constitution, laws of the United States or

treaties made, it clearly refrained from making that decision, and said, in the course of the opinion:

> "We omit as unnecessary to the disposition of this case any consideration of the applicability of the first two clauses, because we think the case comes within the third clause, and we need not now go further. This is a controversy to which the United States may be regarded as a party. It is one, therefore, to which the judicial power of the United States extends. It is, of course, under that clause, a matter of indifference whether the United States is a party plaintiff or defendant. It could not fairly be adjudged that the judicial power of the United States extends to cases in which the United States is a party plaintiff and does not extend to those cases in which it is a party defendant."

All that was decided in the case respecting the jurisdiction on the ground of citizenship was that the Secretary of the Interior, who was described as a citizen of Missouri, and the Commissioner of the Land Office, who was described as a citizen of Oregon, stood for the United States, and really made the United States a party defendant, and that the citizenship of these officials—they having no personal interest whatever in the matter—did not make the suit one of a State against citizens of other States.

Second. We submit, further, that the suit at bar, being by the State of Kansas against citizens of other States, is one within the jurisdiction of this court as a suit by a State against citizens of another State. The proposition that some of the defendants are citizens of the Territory, and therefore cannot be sued under the clause of the constitution giving jurisdiction over a suit by a State against the citizens of another, at most could only defeat the jurisdiction as to those defendants who are citizens of the Territory, and would not defeat the jurisdiction as to those defendants who are citizens of other States, of which there are many. If this proposition as made by the Government is true, then it would only result

in defeating the jurisdiction of this court as to the Indian Territory citizens, without affecting its jurisdiction over the vendees of the allottees, who are citizens of other States.

But the Government's contention is unsound. The jurisdiction of this court in this cause is founded upon *subject-matter, i. e.,* "arising under this Constitution, the laws of "the United States, and treaties made * * * under "their authority" (art. III, sec. 2). The succeeding provision, giving original jurisdiction in this court to cases "in "which a State shall be party," is hence *not* limited by any question of individual citizenship of any defendants. The provision of art. III, sec. 2, extending federal jurisdiction to cases "between a State and citizen of another State," is *an additional* ground of jurisdiction and extends to controversies between a State and citizens of another State not arising under the Constitution or laws or treaties of the United States. In other words, it is jurisdiction of *parties* in any justiciable case wholly apart from *subject-matter.* The cases cited to support the Government's contention all involve individual litigants and are hence manifestly inapplicable here.

## III.

This suit of the State of Kansas against the United States can be maintained in this court under the original jurisdiction clause of the Constitution, upon the authority of *United States v. Texas* (143 U. S., 621) and *United States v. Michigan* (190 U. S., 379). The Texas and Michigan cases were suits brought by the United States against those States respectively. The suit now brought by the State of Kansas is the converse, the only difference being that the State is plaintiff and the United States defendant.

The doctrine of the Texas case, and likewise that of the Michigan case, is that the rule that the Government cannot be sued without its consent does not apply to suits between

overeigns. The State of Kansas is a sovereign. The United States is also a sovereign.

The Texas case declares (p. 645) the broad ground that "it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent," but immediately adds:

> "The question as to the suability of one government by another government rests upon wholly different grounds. Texas is not called to the bar of this court at the suit of an individual, but at the suit of the government established for the common and equal benefit of the people of all the States. The submission to judicial solution of controversies arising between these two governments, 'each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other,' *McCulloch v. State of Maryland*, 4 Wheat., 316, 400, 410, but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty. The States of the Union have agreed, in the Constitution, that the judicial power of the United States shall extend to *all* cases arising under the Constitution, laws and treaties of the United States, without regard to the character of the parties, (excluding, of course, suits against a State by its own citizens or by citizens of other States, or by citizens or subjects of foreign States,) and equally to controversies to which the United States shall be a party, without regard to the subject of such controversies, and that this court may exercise original jurisdiction in all such cases, 'in which a State shall be a party,' without excluding those in which the United States may be the opposite party. The exercise, therefore, by this court, of such original jurisdiction in a suit brought by one State against another to determine the boundary line between them, or in a suit brought by the United States against a State to determine the boundary between a Territory of the United States and that State, so far from infringing, in either case, upon the sovereignty, is with the consent of the State sued. Such consent

> was given by Texas when admitted into the Union upon an equal footing in all respects with the other States."

The fundamental basis for this conclusion is that in *this court* controversies between sovereigns—Federal or State—involving justiciable cause stand for original hearing and judgment in this court.

The Constitution does not in express terms confer upon the United States the power to thus appear as party plaintiff in an original suit in this court against a State. And the dissenting opinion in the Texas case (p. 649) stands broadly upon the express letter of the Constitution in this regard.

When, then, the Constitution is interpreted to confer this right of original action upon the United States, the reasoning which leads to that result manifestly applies in present instance; for in the Texas case the opinion cites with approval the observations of Mr. Justice Story, declaring the sovereign right of the United States to sue in its own courts and denying that such rights must be enforced in the State tribunals.

Indeed, the opinion in the Texas case adds the pertinent suggestion that if the rule were otherwise the United States must therefore sue in one of the courts of Texas. Hence, upon the very theory of the decision in the Texas case, it is manifest that Kansas, having a justiciable case against the United States, and the Constitution conferring original jurisdiction in all cases arising under the Constitution, laws, and treaties of the United States "in which a State shall be a party," must of necessity include all cases of such Federal nature wherein the State has justiciable interest. Otherwise the State would be wholly without remedy. If the United States had not sought judicial determination of the controversy with the State of Texas, the State would, in such view, have been without judicial remedy, for the United States would not be suable by the State.

The principle is admirably reasoned in the Texas case.

That immunity from suit by the sovereign, except with its consent, applies only in respect of individuals and not to controversies between the sovereigns leads, *ex necessitate,* to the conclusion that in all controversies of a Federal nature, wherein the State is a party, original suit may be brought in this court, summoning to its bar the United States, precisely as under converse conditions the United States may thus summon in the sovereign State.

In other words, the interpretation of the Constitution, which opens the door of original jurisdiction in this court to the United States against the State, must equally operate under converse conditions, or equality of sovereignty in this regard disappears.

The Constitution of the United States is the Constitution of all the States speaking in a united sense, and this court, as the Supreme Court of the United States, is also, in the same sense, the Supreme Court for all the United States, having original jurisdiction in all cases of Federal cognizance "in which a State shall be a party." The language of the Constitution in this respect is broad and unqualified. Hence, we submit, the door does not here open to the United States against the State and close against the State when the United States is sought to be made defendant.

And this clear conclusion is well expressed in the suit of *Minnesota v. Hitchcock, supra,* thus:

> "It could not fairly be adjudged that the judicial power of the United States extends to cases in which the United States is a party plaintiff and does not extend to those cases in which it is a party defendant."

It is well settled that the sovereignty of the State within its sphere is of the same quality and absolutely equal with the sovereignty of the United States within its sphere. The grant of judicial power under the Constitution extends "to controversies to which the United States shall be a party; to controversies between two or more States," and likewise pro-

vides that "in all cases * * * in which a State shall be a party, the Supreme Court shall have original jurisdiction."

A construction of this great instrument which permits the United States to sue a State in this court ought not, we submit, upon plain principle, to be narrowed in order to *exclude* the State, under like conditions, from invoking the same jurisdiction.

For the United States to hold, through its courts, that it can sue a sovereign State without its consent, and yet cannot be sued in its own courts by that State would show an absence of governmental chivalry, governmental comity, and governmental courtesy. Does not a decision laying down the rule that the United States can sue a State necessarily imply, as between the United States and the State, it consents to be sued by the State? Is it gracious or reasonable for the United States to hold, through its courts, that it can sue one of the States without its consent and then say that it cannot be sued by a State in the United States courts? The fact of holding in favor of the right of the United States to sue the States, as in the Texas and Michigan cases, we submit, necessarily and reasonably implies the consent of the United States in turn to be sued by the States in the United States courts. The question we here present was not alluded to, suggested or decided in the Minnesota and Oregon cases. Had Texas or Michigan been the plaintiff in the cases brought against them, instead of the United States, would not this court have decided that the suits could have been maintained by these States? We assert that the States could have maintained those suits on the same grounds that the United States was permitted to maintain them.

Moreover, if the element of express consent by the United States to be thus sued is essential, it may be forcibly suggested that such consent has been given to individuals to thus sue the United States in all cases at law, in equity, or admiralty, not sounding in tort, by the act of March 3, 1887 (24 Stats., p. 505).

Under that act (known as the "Tucker act") the Court of

Claims is given jurisdiction to hear and determine all claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of the Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the parties would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable.

By section 2 of this act the district courts of the United States are given concurrent jurisdiction with the Court of Claims as to all matters named in the first section where the amount of the claim does not exceed $1,000.00, and the circuit courts of the United States concurrent jurisdiction in all cases where the amount of such claim exceeds $1,000.00 and does not exceed $10,000.00.

Under these statutes and the Constitution of the United States, we claim that the Government has not only impliedly but expressly given its consent to be sued in a case where a State is a party, in the Supreme Court of the United States. It has been held that suits may be instituted in the territorial district court against the Government under these sections, although such territorial courts are not named in the act, under Revised Statutes, section 1910, which provides that each of the district courts in the Territory shall have and exercise the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States.

*United States v. Forman*, 5 Okla., 237.

*Johnson v. United States*, 6 Utah, 403.

In the case last cited, an appeal was taken to the Supreme Court of the United States by the United States, but was dismissed by the consent of the Attorney General (see *United States v. Johnson*, 140 U. S., 703).

The mere circumstance that such suits may be brought in the Court of Claims or, within restricted jurisdictional

amounts, in the circuit and district courts does not, we submit, alter the ultimate *fact* that the United States has recognized the principle that in all cases *ex contractu* it may be thus sued. Can it hence be properly said that a State must be driven to these inferior tribunals as party plaintiff against the United States in the presence of the provision of the Constitution which declares that, in all cases of Federal cognizance wherein the State is a party, original suit may be brought in this court? To so rule is to declare that the sovereignty of the State in such a case ranks only with the privilege of the private individual in all suits against the United States. On principle, and with manifest propriety, it may well be urged that recognition of the obligation of the United States to respond as defendant in suits *ex contractu* may well be held to include the suit of the sovereign State in this court where money recovery is so sought in the alternative.

In *Minnesota v. Hitchcock*, 185 U. S., 387, this court held that the United States was the real party in interest and the real party to be affected by the judgment, and ruled that inasmuch as the Government was a party in interest this court had original jurisdiction, and that the United States had impliedly given its consent to stand as party defendant. This implication was based upon a statute of March 2, 1901, which provides that in any suit instituted in the Supreme Court of the United States to determine the right of a State to what are commonly known as school lands, within any Indian reservation or any Indian cession, where an Indian tribe claims any right to or interest in the lands in controversy, or any disposition thereof by the United States, the right of such State may be fully tested and determined without making the Indian tribe or any portion thereof a party to the suit, if the Secretary of the Interior is made a party thereto, and the duty of representing and defending the right or interest of the Indian tribe or any portion thereof in the matter shall devolve upon the Attorney General upon request of such Secretary. It will be seen that this statute

does not, in express words, provide for any suit against the Government of the United States, or that it shall stand as the responsible party in the event of a determination of such a suit against any claim made by the Indians.

If, under the act of March 2, 1901, Congress impliedly gives its consent to be sued, then, by parity of reasoning, it is manifestly clear that in the case at bar, under the terms of the provisions of the Court of Claims act and the Constitution of the United States, this court has original jurisdiction by reason of the Government being a party in interest and has not only impliedly but expressly given its consent to be sued where a State is a party plaintiff. In brief of counsel for the Government the claim is expressly made that the Government is the real party in interest and has not only undertaken to defend on behalf of the Indians, but, under the act of Congress of June 28, 1898, the United States is the real party in interest and obligated to defend on behalf of the Indians.

We are well aware of the decision recently rendered in State of Oregon *v.* Hitchcock, Secretary of the Interior, and Richards, Commissioner of the General Land Office (202 U. S., 60), wherein, upon demurrer, the bill was dismissed. But we submit the decision therein is not here in point, because:

(1.) The only defendants in that case were the United States officials, whereas the Indians were necessary parties, and the decision so holds.

(2.) The bill sought injunctive relief in preventing transfer of the title of the United States to Indian allottees in respect of lands claimed by the State under a prior grant. No money relief was asked, whereas in the present case, in final analysis, the alternative relief here sought against the United States is a money decree if the primary prayer of the bill establishing title in the State is denied.

(3.) In the Oregon case the title to the land was and is still in the United States, and the decision clearly holds that this court will not interfere while the executive branch of the Government is administering the matter—a doctrine fully settled by many prior and cited cases.

The suggestion that the original jurisdiction of this court in respect of suits "in which a State shall be a party" is further limited also to suits where another State is defendant or citizens of another State are defendants is not applicable here, because:

(1.) The jurisdiction arises by reason of subject-matter, as we submit has been clearly shown *supra*.

(2.) Parties are made defendants by the bill, not officers of the United States nor residents of the Indian Territory, but citizens of the States of Texas, Illinois, and Missouri, who are sued by name and as grantees of specific Indian allottees (bill, pp. 2, 14, 15).

Hence we submit the suit is one between the State as plaintiff and citizens of *other* States as defendants.

The case of *New Hampshire v. Louisiana*, 108 U. S., 76, cited on opposing brief, is not applicable here. There, by general statute, the State had invited its citizens holding obligations against other States to assign them to the State, and upon deposit of estimated cost of the litigation the attorney general of such assignee State was authorized to bring suit in the name of the State in this court against the debtor State. The purpose of such proceeding was clearly to avoid the effect of the eleventh amendment to the Constitution. The State in such instance had no original interest in the subject-matter, had assumed no original duty as trustee, and was in no sense an original party to the controversy. The distinction between the case thus cited and the present is so manifest that further comment is unnecessary.

In the case of *South Dakota v. North Carolina*, 192 U. S., 286, it was held by this court that where the State had a direct interest against another State it could maintain an

original suit in this jurisdiction. In the case at bar the State was the original party to the grant from the United States, and the grant of the lands was to it direct as trustee, and hence Kansas is in no sense an intruding party.

The brief of counsel for the Government in support of the motion to dismiss, as well as its brief heretofore considered by this court, containing suggestions in opposition to the motion for leave to file the bill, claim that this suit is against the United States; that the United States is under an obligation to defend the allottees in their titles, and is expressly required by statute to defend such titles.

Under section 441 of the Revised Statutes the Secretary of the Interior is charged with the supervision of public business relating, among others, to the Indians and the public lands.

And under section 463, Revised Statutes, the Commissioner of Indian Affairs is required, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, to have the management of all Indian affairs and of all matters arising out of Indian relations.

The bill in this case, pages 15, 16, alleges:

> "Your oratrix further shows that the defendant the Creek nation, and the defendant Pleasant Porter, as principal chief of said nation, are charged by law and the usages and customs of the Creek nation with the duty of defending the title to the said allotted lands, and in pursuance of that duty have requested the defendant Hitchcock, the Secretary of the Interior, and Francis E. Leupp, United States Indian Commissioner, for and on behalf of the United States, to defend the title of said lands to said allottees and those claiming under them, and that the Secretary of the Interior and the United States Indian Commissioner claim that they are charged by law with the duty, and have charged themselves with the duty, of defending the titles, of the said allottees against your oratrix, notwithstanding the prior express grant of said lands to your oratrix, and accordingly the Secretary of the Interior has requested the Attorney-General of the

> United States to defend all suits involving the titles of the allottees of said lands, and the Department of Justice, acting through the Attorney-General, has charged itself with the duty of defending the titles of the allottees to said lands against your oratrix."

The case of the *State of Oregon against Hitchcock*, 202 U. S., page 60, *et seq.*, only decided that in that particular case the State could not sue the Secretary of the Interior and Commissioner of the General Land Office, in the absence of an act of Congress waiving immunity of the United States, or consenting that it be sued in respect to the swamp lands there in question. This decision was made upon the authorities which hold that the courts cannot enjoin the administration of land grants where the title is still in the United States. There the title was in the United States, while in the case at bar the title, according to the allegations of the bill, has passed out of the United States and is in the State of Kansas as the trustee for the railway company.

The power of the Secretary of the Interior and the Land Department, respecting these lands, has ceased, and the State of Kansas seeks to assert its title to the land. Its claim for money relief is based upon the idea that the United States has attempted to convey these lands, which belong to the State, to other parties, and having conveyed the lands of the State to other parties, if such conveyance is for any reason held to be effectual so as to pass title to the allottees, then the United States is responsible to the State of Kansas for the money value of the lands.

So, we have a case here where the United States has attempted to convey lands belonging to the State of Kansas to individual allottees; is under an obligation to defend the title of the allottees, and when the State asserts title to those lands, comes forward and actually defends, and is under an obligation to defend, as it claims, the title of the allottees. In such case the United States, as the warrantor asserting title for its grantees, the allottees, is properly a defendant.

Under this state of facts, we claim the irresistible inference to be that, under the law as it stands and as it is interpreted and administered by the Department of the Interior and the Judicial Department of the United States, the United States has given its consent to be sued, just as effectually as if it had done so by express words.

The United States is here now, defending for the Indian allottees and their grantees. In every forum in which the allottees will be threatened with the claim of the State of Kansas, the United States will be found asserting a defense for these allottees and their vendees. The proof that the United States has consented to be sued in a case of this kind is as strong and persuasive as it was in the Minnesota case. It would be strange, indeed, if the United States could, wherever and whenever the State of Kansas asserts title to the lands under its land grant, appear and defend, having the right to do so, and yet claim that it is not subject to a direct suit by the State of Kansas.

Under the Court of Claims act, as it has been interpreted, courts are not given jurisdiction to interfere with the administration of the land laws of the United States so as to enforce their specific performance, but they are clearly given jurisdiction, where the lands have passed from under their jurisdiction, through an act of the Government converting them to its own use or that of other grantees, and thus breaking the contract made by the Government's grant, in this instance to the State of Kansas.

## IV.

The suggestion that "it does not appear that all the lands "in controversy have been allotted" is not correct. The bill (pp. 12, 13, and especially 16) shows that "generally speak- "ing all lands within twenty miles of the Missouri, Kansas "and Texas railway *have been allotted.*" It is because of such allotments (which have been practically completed) and

the attempted transfer to such allottees of the title of the United States, notwithstanding the prior grant of the same lands to the State, that this bill is now presented. The suggestion of the attorney general would compel a separate suit in respect of each actual allotment, a proceeding condemned by settled equity practice. Refusal to entertain the cause upon such an objection would, we submit, be most inequitable. Otherwise the State could not present its single bill until the last individual allotment had been made. That could be deferred indefinitely, and when accomplished the plea of laches against the State would as obviously be then interposed. This cause is too important in every view and upon all sides to be now withheld from judgment upon such a strained suggestion.

The suggestion in the brief of counsel for defendants that the railway company is interested in the suit of the State of Kansas and some of its counsel are attorneys of the railway company seems to us trivial. The State of Kansas, in bringing this suit in its right as trustee for its beneficiary, had the right to call upon the beneficiary for indemnity. This is the rule with reference to all trustees. A trustee is entitled to be indemnified by the beneficiary. It is a matter of common practice and manifest propriety for the beneficiary to call upon the trustee to act, and cannot in any possible view affect the jurisdiction of the court to hear and determine the cause.

The final suggestion of opposing brief is directed solely to the *merits* of the cause. No present answer is required. The grave questions involved in this controversy cannot be thus settled in a few lines of mere suggestion which ignores all discussion of the meaning and effect of the original grant *in præsenti* to the State, since fully and seasonably earned, and all reference to the legal effect of the efforts of the grantor to thereafter repudiate the grant and deliberately avoid the contract. Certainly against such wrongs and upon the full recital of all the facts as set forth in the bill the judicial power vested under the Constitution in this court to hear and

determine the controversy constitutes the very essence of due process of law. From that inquiry the United States should not shrink nor, we submit, interpose objections which seek to deny all judicial inquiry or remedy here or elsewhere.

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*Of Counsel.*

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Office Supreme Court,
FILED
NOV 9 1906
JAMES H. McKENN

No. 11, Original.

# In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE STATE OF KANSAS, COMPLAINANT,

*v.*

THE UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS.

# DEMURRER.

# In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE STATE OF KANSAS, COMPLAINANT,
*vs.*
THE UNITED STATES OF AMERICA ET AL., DEFENDANTS.
**No. 11, Original.**

## DEMURRER.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The demurrer of William Fisher, one of the defendants herein, by James W. Zevely, James M. Givens and Edgar Smith, his solicitors, to the bill of complaint of the State of Kansas, by Chiles C. Coleman, solicitor for and Attorney General of said State of Kansas.

The defendant William Fisher, above named, demurs to complainant's bill herein and for cause of demurrer shows:

FIRST. This court has no jurisdiction of this cause,

because it appears from the face of the bill that the matters complained of do not constitute, within the meaning of the constitution of the United States, a controversy between the State of Kansas and the United States.

SECOND. Because it appears from the face of the said bill that it does not state facts sufficient to constitute a cause of action.

WHEREFORE, and for divers other good causes of demurrer to said bill, this defendant demurs thereto and prays judgment that he be not required to plead further.

JAMES W. ZEVELY,
JAM . M. GIVENS,
EDGAR SMITH,
Solicitors for William Fisher.

FILE COPY.

No. 25, Original.

# In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE STATE OF KANSAS, COMPLAINANT,

*v.*

THE UNITED STATES ET AL., DEFENDANTS.

SUGGESTIONS ON BEHALF OF THE UNITED STATES IN OPPOSITION TO THE MOTION FOR LEAVE TO FILE.

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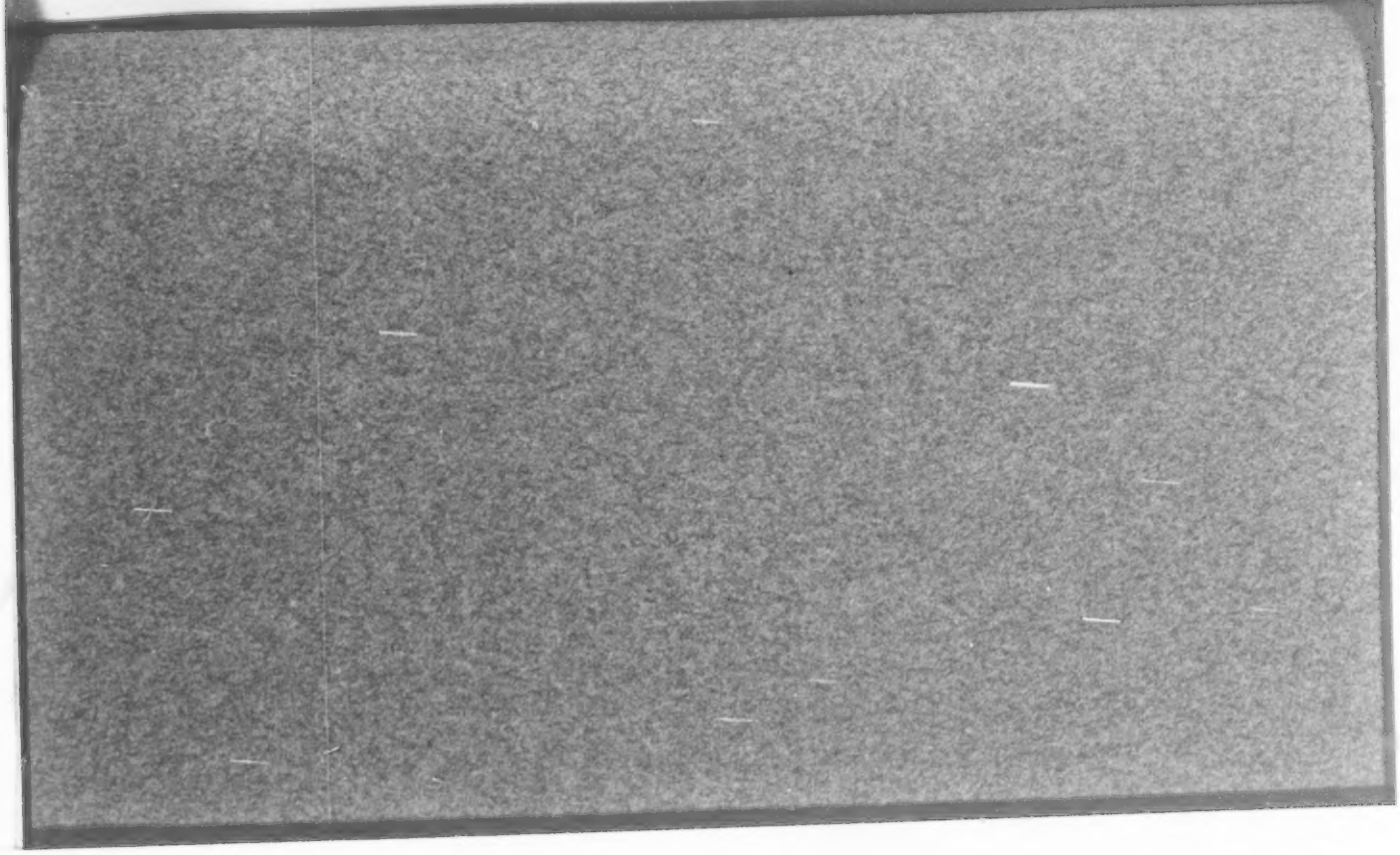

# In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE STATE OF KANSAS, COMPLAINANT,
*v.*
THE UNITED STATES OF AMERICA ET AL., defendants.

No. —, Original.

## SUGGESTIONS ON BEHALF OF THE UNITED STATES IN OPPOSITION TO THE MOTION FOR LEAVE TO FILE.

There are precedents for interposing objections at this time. (*In re Baez*, 177 U. S., 378; *In re Vidal*, 179 U. S., 126; *In re Oli Nifou*, 198 U. S., 581.)

Leave is asked by the attorney-general of Kansas to file a bill on behalf of the State as trustee for the Missouri, Kansas and Texas Railway Company of certain lands alleged to have been granted to the State to aid in the construction of railroad and telegraph lines.

The acts of Congress granting the lands in question (Bill of Complaint, pp. 21 to 33) provide, sections 1:

> That for the purpose of aiding the * * * Railroad Company * * * to construct and operate a railroad * * * there is hereby granted to the State of Kansas, for the use and benefit of said railroad company every alternate section of land or parts thereof designated

> by odd numbers * * * *Provided*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act. * * *
>
> SEC. 9. *And be it further enacted*, That the same grant(s) of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: *Provided*, That said lands become a part of the *public lands* of the United States.

The bill alleges that the road was properly constructed through the Indian Territory (p. 64), and sets out at length Indian treaties and Congressional legislation with reference to that Territory, under which it is alleged that the Creek Indian Nation has ceased to occupy or claim the same as a tribe or nation, that some of the lands have been allotted in severalty to individual members of that nation (p. 122), and that said lands thereby became a part of the public lands of the United States and passed to the State under the provisions of the grants above mentioned.

A decree is therefore asked adjudging that the State is the owner as trustee for the railway company of all odd-numbered sections of land to the extent of ten sections per mile along the line of its road through

the Creek Nation, and that the allottees be decreed to surrender possession to the State as trustee and be enjoined from disposing of said lands (p. 160), or "in the event that from any equitable considerations the court should entertain the view that the allottees and those claiming under them should not be disturbed, then that an account be taken of the value of the lands in controversy" and the United States adjudged to pay to the State as trustee the sum of such values (p. 161), estimated at more than $10,000,000 (p. 159).

I.

It does not appear that the attorney-general for the State of Kansas has any authority to institute the contemplated suit.

It is submitted that the attorney-general of a State has no right to bring an action in its behalf unless so authorized by an act of the legislature of the State or by direction of its governor. (See *Texas* v. *White*, 7 Wall., 700, 718–719.)

II.

The proposed suit is not one of which this court has original jurisdiction.

That jurisdiction is limited to two classes of cases:

(*a*) Those which affect ambassadors, other public ministers, and consuls; and

(*b*) Those in which a state shall be a party (Constitution, Article III, section 2), subject to limitations of Amendment XI.

The State of Kansas has no substantial interest in the subject-matter and is but nominally the complainant, the real party in interest being the railway company, as appears upon the face of the bill.

By the terms of the granting act the legal title passed to the railroad company, if at all, upon the construction of the road.

The granting acts provide (bill, p. 30):

> SEC. 3. * * * And the lands hereby granted shall inure to the benefit of the said company, as follows: When the governor of the State of Kansas shall certify that any section of ten consecutive miles of said road is completed * * * then the said Secretary of the Interior shall issue to the said company patents for so many sections of the land herein granted within the limits above named.

Grants containing such provisions as this or made directly to the railroad vest title in the company upon the performance of their conditions. (*Wisconsin Railroad Company* v. *Price County*, 133 U. S., 496, 511; *Van Wyck* v. *Knevals*, 106 U. S., 360, 365; *Sioux City, etc., Railroad* v. *United States*, 159 U. S., 349, 364; *Deseret Salt Company* v. *Torpey*, 142 U. S., 241.) If, on the other hand, patents are to issue to the State, then its character as a trustee attaches. (*Sioux City, etc., Railroad* v. *United States, supra.*) The State is not interested in the construction of a road beyond its boundaries and Congress did not intend to grant to it lands for that purpose.

In formal communications and protests by it to the

Dawes Commission, the town-site commission, the Indian agent, and the Secretary of the Interior, the tracts in question have been claimed by the railway company invariably heretofore as its own, without reference to any interest of the State therein. (Bill, pp. 111, 131, 138, 143, 149.)

Of the counsel for the State one at least belongs to the legal department of the railway company. (Bill, pp. 137, 143, 149, 154.)

Apparently the proceeding is under the control of the railroad company and the name of the State is used simply for the purpose of prosecuting the claim of the company to the lands in question and as a collecting agent for it if the value thereof could be recovered against the United States. Doubtless the expense of the action is to be borne by the railroad.

Under such circumstances it is well settled that this court does not possess original jurisdiction of suits by a State.

Thus, in the case of *New Hampshire* v. *Louisiana* (108 U. S., 76) the State of New Hampshire, under an act of its legislature authorizing such assignments and suits, sought to bring an original suit as assignee of valid obligations on the part of Louisiana. All expenses were to be paid by the assignor and the amount recovered by the attorney-general of the State as *special trustee* and turned over to the assignor of the bonds after deducting expenses. This court held that the bondholders and not the State of New Hampshire were the real parties in interest, and that therefore it did not have original jurisdiction.

## III.

This would not be a suit by a State against citizens of another *State*, nor one in which the United States, the real party in interest as defendant, has consented to be sued.

The authority of this court to entertain original jurisdiction of a suit instituted by a State is limited to three classes:

(*a*) Where another *State* is a party defendant.

(*b*) Where citizens of another *State* are defendants.

All parties defendant other than the United States and its officers are citizens of the Indian Territory and it is submitted that therefore they can not be sued originally by a State in this court.

It is settled that a Territory is not a State in the sense in which that term is used in the Constitution, and that a suit by a citizen of a Territory can not be maintained under that provision of the Constitution declaring that the jurisdiction of the courts of the United States shall extend "to controversies between citizens of different States." (*Corporation of New Orleans* v. *Winter*, 1 Wheat., 92; *Downes* v. *Bidwell*, 182 U. S., 244, 259.)

(*c*) Where the United States is the real party in interest and has consented to be sued therein.

> The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record, but by the question of the effect of the judgment or decree which can be entered. (*Minnesota* v. *Hitchcock*, 185 U. S., 373, 387; *Oregon* v. *Hitchcock*, No. 16, original, decided April 23, 1906.)

In this case the only parties defendant other than the United States and its officers are Creek Indian allottees, and if their allotments should be taken from them, which is a part of the relief sought by the bill, the United States would be subject, under acts of Congress and its agreements with them, to a demand from them for the value thereof or for other lands. (30 Stats. L., 505.)

The alternative relief sought is entirely against the United States, as follows:

> Or in the event that from any equitable considerations the court should entertain the view that the allottees and those claiming under them should not be disturbed, then that an account be taken of the value of the lands in controversy at the time of the respective allotments, and the defendant, the United States of America, be ordered, adjudged, and decreed to pay to your oratrix, as trustee, the sum of such values.

The United States is therefore the real party in interest as defendant. It has not consented to be sued, and of course can not be sued without its consent. (*Minnesota* v. *Hitchcock*, and *Oregon* v. *Hitchcock*, *supra*; *United States* v. *Lee*, 106 U. S., 196, 207; *Taylor on Jurisdiction of Supreme Court*, p. 63.)

Jurisdictional qualities must exist as to all parties in order to confer jurisdiction. (*Great Southern Hotel Company* v. *Jones*, 177 U. S., 449.) Therefore, being without jurisdiction as to the United States, there is no jurisdiction of any of the parties.

IV.

It does not appear that all the lands in controversy have been allotted. That the courts will not interfere with the land department in the disposal of land so long as the title in any sense remains in the United States is well settled. (*Bockfinger* v. *Foster*, 190 U. S., 116; *Oregon* v. *Hitchcock*, *supra.*)

V.

It is submitted that the grants in question were intended to embrace public land only, that is, land which at the taking effect of the grant was subject to disposition under the general land laws. (*Newhall* v. *Sanger*, 92 U. S., 761.)

In *Leavenworth, etc., R. R.* v. *United States* (92 U. S., 733) it was held that where the right of an Indian tribe to the possession and use of certain lands as long as it may choose to occupy the same is assured by treaty, a grant of "land" in general terms will not be construed to embrace them.

It appears from the bill that the lands were not only burdened with an Indian right of occupancy secured to them by treaty, but that the Indians were in possession by virtue of a patent theretofore issued to their tribal nation by the United States.

It is respectfully submitted that permission to file the bill should not be granted.

WILLIAM H. MOODY,
*Attorney-General.*
HENRY M. HOYT,
*Solicitor-General.*

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OCT 17 1906
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No. 11, Original.

# In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE STATE OF KANSAS, COMPLAINANT,

*v.*

THE UNITED STATES OF AMERICA ET AL.,
DEFENDANTS.

**MOTION ON BEHALF OF THE UNITED STATES AND OTHERS TO DISMISS FOR WANT OF JURISDICTION, AND BRIEF IN SUPPORT THEREOF.**

# In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THE STATE OF KANSAS, complainant,
*v.*
THE UNITED STATES OF AMERICA et al., defendants.

No. 11, Original.

*MOTION ON BEHALF OF THE UNITED STATES AND OTHERS TO DISMISS FOR WANT OF JURISDICTION, AND BRIEF IN SUPPORT THEREOF.*

## MOTION.

Comes now the Attorney-General on behalf of the United States of America; Ethan Allen Hitchcock, Secretary of the Interior; Francis E. Leupp, Commissioner of Indian Affairs; Tams Bixby, Commissioner to the Five Civilized Tribes; J. George Wright, United States indian inspector for the Indian Territory; Dana H. Kelsey, United States indian agent for the Indians of the Union agency in the Indian Territory; the Muskogee or Creek nation or tribe of Indians; Pleasant Porter, principal chief of the Muskogee or Creek nation or tribe of Indians; John F. Ingram, David Whitlow, George W. Grayson, Napoleon B. Moore, Conny

Murphy, David A. Lee, Googan Sarty, James Childres, W. B. Rogers, Alexander L. Posey, Wm. N. Moore, Temiye Kernells, John Jefferson, Henry C. Reed, Sam Grayson, George Malvern, Jake (A. J.) Berryhill, Wattey Yahola, George Marshall, Robert Brener, Sarah A. Asbill, and Jake Smith, Creek Indian allottees, and the divers other allottees defendants in the above-entitled case, and appearing for the purposes of this motion only, moves the court to dismiss the bill of complaint, and as cause therefor respectfully submits the following reasons:

**STATEMENT.**

Suit is brought by the attorney-general of Kansas on behalf of the State as trustee for the Missouri, Kansas and Texas Railway Company of certain lands alleged to have been granted to the State for the benefit of the railroad company.

The act of Congress granting the lands in question (bill of complaint, pp. 21 to 33; 14 Stats. L. 236, 289) provides:

> That for the purpose of aiding the Union Pacific Railroad Company, Southern Branch, the same being a corporation organized under the laws of the State of Kansas to construct and operate a railroad from Fort Riley, Kansas, or near said military reservation, thence down the valley of the Neosho River to the southern line of the State of Kansas, with a view to an extension of the same through a portion of the Indian Territory to Fort

Smith, Arkansas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company every alternate section of land or parts thereof designated by odd numbers, to the extent of five alternate sections per mile on each side of said road and not exceeding in all ten sections per mile. * * *

SEC. 3. * * * And the lands hereby granted shall inure to the benefit of said company as follows: When the governor of the State of Kansas shall certifiy that any section of ten consecutive miles of said road is completed in a good, substantial, and workmanlike manner, as a first-class railroad, then the said Secretary of the Interior shall issue to the said company patents for so many sections of the land herein granted within the limits above named, and coterminus with said completed section hereinbefore granted.

SEC. 9. *And be it further enacted*, That the same grant [s] of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: *Provided*, That said lands become a part of the public lands of the United States.

The bill alleges that the road was properly constructed thru the Indian Territory (p. 64), and sets out at length Indian treaties and Congressional legislation with reference to that Territory, under

which it is alleged that the Creek Indian Nation has ceased to occupy or claim the same as a tribe or nation, that some of the lands have been allotted in severalty to individual members of that nation (p. 122), and that said lands thereby became a part of the public lands of the United States and past to the State under the provisions of the grant above mentioned.

A decree is therefore asked, adjudging that the State is the owner as trustee for the railway company of all odd numbered sections of land to the extent of the grant along the line of the road thru the Creek Nation in the Indian Territory, and that the allottees be directed to surrender possession to the State as trustee and be enjoined from disposing of said lands (p. 160), or "in the event that from any equitable considerations the court shall entertain the view that the allottees and those claiming under them should not be disturbed, then that an account be taken of the value of the lands in controversy" and the United States adjudged to pay to the State as trustee the sum of such values (p. 161), estimated at more than $10,000,000 (p. 159).

## BRIEF.

### I.

The suit is not one of which this court has original jurisdiction. A State is not a party within the meaning of the Constitution, Article III, section 2.

The State of Kansas has no substantial interest in the subject-matter, and is but nominally the complainant, the real party in interest being the railway company, as appears upon the face of the bill.

By the terms of the granting act the legal title past to the railroad company, if to anyone, at the date of the grant or at least upon the construction of the road.

In *Rice* v. *Railroad Company* (1 Black, 358), lands had been granted to the Territory of Minnesota "for the purpose of aiding in the construction of a railroad," and afterwards the granting act had been repealed by Congress. The court said (p. 381): "We think it is clear that the Territory acquired nothing under the act of Congress set up in the answer but *a mere naked trust or power to dispose of the lands* in the manner therein specified and to apply the same to the use and purpose therein described." The repealing act was therefore held valid.

It is a well-settled principle that a conveyance to trustees for certain purposes or uses carries the legal estate to the beneficiaries, unless there are duties imposed on the trustees the performance of which requires the legal estate to be vested in them, in which event they would take an estate commensurate with the exigencies of their trust. (*Webster* v. *Cooper*, 14 How., 488, 499; *Long* v. *Long*, 62 Md., 65; *Perry on Trusts*, secs. 351, 352, 520, 521.) This is the rule in Kansas (General

Statutes of Kansas [1905], sec. 8624; *Bayer* v. *Cockerill*, 3 Kans., 282, 292.)

It is equally established that when an estate is given to trustees for a certain purpose, or until the happening of a certain event, the intermediate estate of the trustee is terminated upon the accomplishment of the purpose or occurrence of the event. (*Felgner* v. *Hooper*, 80 Md., 262, *Perry on Trusts*, sec. 351.)

The grant here was "for the purpose of aiding the railroad company to construct and operate a railroad." If that purpose has been accomplished, or the State's share in the undertaking, then the trust has terminated and the legal title has become vested in the company; if it has not, then there is no cause for complaint.

There is evidence that the trust was executed by a transfer of the lands to the railroad company. A mortgage given by the predecessor of the company, dated November 14, 1868, on file in the General Land Office, recites that "the State of Kansas has accepted said grant from Congress and regranted the same to the party of the first part." That mortgage covers "all the lands and claims to lands which were granted to the State of Kansas and then granted by said State to said railway company." Apparently this conveyance was properly authorized. (Kansas General Statutes [1905], secs. 7335, 7338.)

But we submit that in this case the State was not even a trustee. It was no more than perhaps

a repository in which the title might remain pending the performance of the condition of the grant, or a conduit thru which title might thereupon pass.

The granting act, section 3, provides that patents shall issue, not to the State as in the case of *Rice* v. *Railroad Company*, *supra*, but to the railroad company direct.

Under such circumstances title vests in the company and not in the State. Thus said this court in the case of *Sioux City, etc., Railroad* v. *United States* (159 U. S., 349, 363):

> Another contention is that upon the issuing of the patents of 1872 and 1873 to the State for the use and benefit of the railroad company the title vested absolutely in the company, and the lands were thereby freed from restraints of alienation, from conditions subsequent, or from liability to forfeiture. In support of this contention reference is made to *Bybee* v. *Oregon and California Railroad*, 139 U. S., 663, 674, 676–677; *Van Wyck* v. *Knevals*, 106 U. S., 360; *Wisconsin Central Railroad* v. *Price County*, 133 U. S., 496; *Deseret Salt Co.* v. *Tarpey*, 142 U. S., 241; *St. Paul and Pacific Railroad* v. *Northern Pacific Railroad*, 139 U. S., 1, 6.
>
> *But these are cases, as an examination of them will show, in which the grant was directly to the railroad company, or in which the act of Congress required that the patents for lands earned should be issued, not to the State for the benefit of the railroad company, but directly to the company itself. In the case now before us the statute directed patents to be*

> *issued to the State for the benefit of the company. So that, until the State disposed of the lands, the title was in it, as trustee, and not in the railroad company.* (*Schulenberg* v. *Harriman*, 12 Wall, 44, 59; *Lake Superior Ship Canal and Co.* v. *Cunningham*, 155 U. S., 372. See also *McGregor, etc., Railroad* v. *Brown*, 36 Iowa, 655; *Sioux City and St. Paul Railroad* v. *Osceola County*, 43 Iowa, 318, 321.)
>
> In the case last named the Sioux City Company was relieved from the payment of the taxes upon some of the lands patented to the State for its benefit, upon the ground that the legal title was in the State, and the lands for that reason were not taxable. The question is altogether different from what it would be if patents for these lands had been issued, or if the State had conveyed them directly to that company.

This language was quoted with approval as a correct statement of the law in *Knepper* v. *Sands* (194 U. S., 476, 481).

A patent is not essential to a transfer of the legal title. It is simply evidence that the condition of the grant has been complied with. (*Deseret Salt Company* v. *Tarpey*, 142 U. S., 241.) Title passes by the grant upon the performance of its conditions, and, of course, the patent being evidence of title, it passes in the manner and to the grantee to whom the patent is to be issued. In this case, therefore, title past to the company, and the State of Kansas had no further interest in the transaction.

It can not be properly contended that the provisions of section 3 do not apply to the grant made in section 9. The latter section provides for "the same" grant as contained in section 2, and under this "same" grant patents were to be issued directly to the company. No provision for issuing patents in a different way is found anywhere. That each part of a statute should be construed with reference to every other part of it is too well settled to call for more than a reference. (Sutherland on Stat. Const., vol. 2, 2d ed., sec. 368.)

But the lands in Indian Territory were never granted to the State of Kansas. If granted at all the grant as to them was to the railroad company direct.

The first section of the granting act provides:

> That for the purpose of aiding the * * * Railroad Company * * * to construct and operate a railroad from Fort Riley, Kansas, or near said military reservation, thence down the valley of the Neosho River *to the southern line of the State of Kansas, with a view to the extension of the same* through a portion of the Indian Territory to Fort Smith, Arkansas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company, every alternate section * * * on each side of *said* road.

Then section 9 provides:

> That the same grants of land through said Indian Territory are hereby made as provided in the first section of this act, when-

> ever the Indian title shall be extinguished by treaty or otherwise, * * * provided that said lands become a part of the public land of the United States.

The road in aid of which the grant was made to the State extended no farther than the southern boundary of Kansas. Section 9 significantly does not mention the State. A grant to a State of lands outside its boundaries would be out of the ordinary and remarkable. "With a view to an extension of the same thru a portion of Indian Territory" in section 1 and the language of section 9 speak entirely of future action and passing of title at a later date. Congress may have thought that by the time the road could be built and title could pass in Indian Territory some other State would be created within that jurisdiction, as is about to be done, or it may have intended that as all the conditions of the grant would be accomplished long before these Indian Territory lands could possibly become "public lands," the grant, if any, in Indian Territory should be to the company direct.

As patents were to be issued to the company and not to any State, and both grants were for the purpose of aiding a particular named company, and the lands mentioned in Sec. 9 were out of Kansas, it was unimportant to name the grantee of the grant made by that section. It was inconvenient to name a trustee and unnecessary to

preclude the possibility of constituting one in the future.

The State is not especially interested in the construction of a road beyond its boundaries, and Congress did not intend to grant to it the lands to be used for that purpose.

In formal communications and protests by it to the Dawes Commission, the town-site commission, the Indian agent, and the Secretary of the Interior, the tracts in question have been claimed by the railway company invariably heretofore as its own, without reference to any interest of the State therein. (Bill, pp. 111, 131, 138, 143, 149.)

Of the counsel for the State two at least belong to the legal department of the railway company. (Bill, pp. 137, 143, 149, 154.)

Apparently the proceeding is under the control of the railroad company and the name of the State is used simply for the purpose of prosecuting the claim of the company to the lands in question, the expense of the action being borne by the railroad.

Under these circumstances it is well settled that this court does not possess original jurisdiction.

Thus, in the case of *New Hampshire* v. *Louisiana* (108 U. S., 76), the State of New Hampshire, under an act of its legislature authorizing such assignments and suits, sought to bring an original action as assignee of valid obligations on the part of Louisiana. All expenses were to be paid by the assignor and the amount recovered by the attorney-

general of the State as *special trustee* and turned over to the assignor of the bonds after deducting expenses. This court held that the bondholders and not the State of New Hampshire were the real parties in interest, and that therefore it did not have original jurisdiction.

## II.

This is not a suit by a State exclusively against citizens of another State.

Some of the parties defendant, other than the United States and its officers, are citizens of the Indian Territory, and it is submitted that therefore they can not be sued originally by a State in this court.

It is settled that a Territory is not a State in the sense in which that term is used in the Constitution, and that a suit by a citizen of a Territory can not be maintained under that provision of the Constitution declaring that the jurisdiction of the courts of the United States shall extend "to controversies between citizens of different States." (*Corporation of New Orleans* v. *Winter*, 1 Wheat., 92; *Downes* v. *Bidwell*, 182 U. S., 244, 250.)

As to some of the defendants, therefore, it is not a controversy between "a State and citizens of another State."

Jurisdictional qualities must exist as to all parties in order to confer jurisdiction. (*Great Southern Hotel Company* v. *Jones*, 177 U. S., 449.)

Therefore, being without jurisdiction as to those defendants who are citizens of Indian Territory, there is no jurisdiction as to any of the parties.

If it be contended that the subject-matter of the suit confers jurisdiction, the suggestion of Mr. Justice Brewer in the case of *Minnesota* v. *Hitchcock*, 185 U. S., 373, 384, is pertinent. He said:

> If it were held that this court had original jurisdiction of every case of a justiciable nature in which a State was a party and in which was presented some question arising under the Constitution, laws of the United States, or treaties made under their authority, many cases, both of a legal and an equitable nature, in respect to which Congress has provided no suitable procedure, would be brought within its cognizance.

## III.

The United States, the real party in interest as defendant, has not consented to be sued, and can not be sued without its consent.

> If whether a suit is one against a State is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States.
>
> The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record, but by the question of the effect of the

judgment or decree which can be entered. (*Minnesota* v. *Hitchcock*, 185 U. S., 373, 387; *Oregon* v. *Hitchcock*, 202 U. S., 60.)

In this case the only parties defendant other than the United States and its officers are Creek Indian allottees and persons claiming under them, and if their allotments should be taken from them, which is a part of the relief sought by the bill, the United States would be subject, under acts of Congress and its agreements with them, to a demand from them for the value thereof or for other lands. (30 Stat. L., 514.)

The alternative relief sought is entirely against the United States, as follows:

> Or in the event that from any equitable considerations the court should entertain the view that the allottees and those claiming under them should not be disturbed, then that an account be taken of the value of the lands in controversy at the time of the respective allotments, and the defendants, the United States of America, be ordered, adjudged, and decreed to pay to your oratrix, as trustee, the sum of such values.

The United States is therefore the real party in interest as defendant. It has not consented to be sued, and of course can not be sued without its consent, even by a State. (*Minnesota* v. *Hitchcock*, and *Oregon* v. *Hitchcock*, *supra*; *United States* v. *Lee*, 106 U. S., 196, 207.)

It is true that a State may be sued by the United States without its consent, the theory being that upon the admission of a State it thereby consents to be sued by the sovereignty of which it becomes a constituent part. (*United States* v. *Texas*, 143 U. S., 621.) The contention for the converse of this proposition, namely, that when a State is admitted the United States consents to be sued by it, is obviously unsound. The harm that may come from numerous suits against the General Government without its consent by the various States which compose it need not be suggested. The question was squarely decided and settled by the opinion of the court in *Minnesota* v. *Hitchcock* and *Oregon* v. *Hitchcock*, *supra*.

IV.

It does not appear that all the lands in controversy have been allotted. That the courts will not interfere with the Land Department in the disposal of land so long as the title in any sense remains in the United States is well settled. (*Bockfinger* v. *Foster*, 190 U. S., 116; *Oregon* v. *Hitchcock*, *supra*.)

V.

It is suggested, in passing, that in any event the grant in question was expressly declared to embrace public land only—that is, land which at the taking effect of the grant was subject to disposition under general laws, and these lands in Indian

Territory never became such. (*Newhall* v. *Sanger*, 92 U. S., 761.)

It is respectfully submitted that the suit should be dismissed for want of jurisdiction.

WM. H. MOODY,
*Attorney-General.*

HENRY M. HOYT,
*Solicitor-General.*

CHARLES W. RUSSELL,
*Assistant Attorney-General.*

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# Supreme Court of the United States.

No. 11, Original.—October Term, 1906.

The State of Kansas, Complainant,
*vs.*
e United States of America et al., Defendants.

[February 25, 1907.]

Mr. Chief Justice Fuller delivered the opinion of the Court:

On April 30, 1906, the State of Kansas applied for leave to file a bill complaint against the United States and others, to which the United tes objected on the ground of want of jurisdiction. May 21 leave s granted, without prejudice, and the bill was accordingly filed. As h an application by a State is usually granted as of course, we thought viser to allow the bill to be filed, but reserving to the United States the ht to object to the jurisdiction thereafter, and hence the words, "with- prejudice," were inserted in the order. October 9 leave was granted he United States to file a demurrer, and in lieu of this a motion to miss was substituted, which was submitted November 12 on printed efs on both sides.

The bill was filed by the Attorney General of Kansas, on behalf of the te, as trustee for the Missouri, Kansas and Texas Railway Company, of tain lands in the Indian Territory, alleged to have been granted to the te for the benefit of the railway company.

t is stated by counsel for complainant, as appearing from the bill, that 1866 "there were three Kansas railroad companies running through State to the Indian Territory line. The first was the Union Pacific ilway Company, Southern Branch, since the Missouri, Kansas and Texas ilway Company, extending from Fort Riley, now Junction City, Kansas, a southeasterly direction, down the valley of the Neosho River, to the thern line of the State of Kansas, near Chetopa, Kansas; the second the Leavenworth, Lawrence and Fort Gibson Railway Company, since veyed to the Atchison, Topeka and Santa Fe Railroad Company, extend- from Leavenworth, through Lawrence, to the northern line of the lian Territory, near Coffeyville, Montgomery County, Kansas, in the ection of Galveston Bay, in Texas; and the third was the Kansas and osho Valley Railway Company, since the Kansas City, Fort Scott and mphis, and now a part of the St. Louis and San Francisco Railroad

Company, extending from a point of connection with the Union Pacific Railroad at or near the mouth of the Kansas River; thence southeasterly, through the eastern tier of counties, to the northern line of the Indian Territory, at or near Baxter Springs, in Cherokee County, Kansas."

On July 25, 1866, an act of Congress was passed entitled "An Act granting lands to the State of Kansas to aid in the construction of the Kansas and Neosho Valley Railroad and its extension to Red River." 14 Stat. 236, c. 241. On the next day, July 26, an act was passed, using the same language, except as to the routes, entitled "An Act granting lands to the State of Kansas to aid in the construction of a Southern Branch of the Union Pacific Railway and Telegraph Company, from Fort Riley, Kansas, to Fort Smith, Arkansas," 14 Stat. 289, c. 270, which provided as follows:

"That for the purpose of aiding the Union Pacific Railroad Company, Southern Branch, the same being a corporation organized under the laws of the State of Kansas to construct and operate a railroad from Fort Riley, Kansas, or near said military reservation, thence down the valley of the Neosho River to the southern line of the State of Kansas, with a view to an extension of the same through a portion of the Indian Territory to Fort Smith, Arkansas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company every alternate section of land or parts thereof designated by odd numbers, to the extent of five alternate sections per mile on each side of said road and not exceeding in all ten sections per mile; . . ."

"SEC. 3. . . . And the lands hereby granted shall inure to the benefit of said company, as follows: When the governor of the State of Kansas shall certify that any section of ten consecutive miles of said road is completed in a good, substantial, and workmanlike manner as a first-class railroad, then the said Secretary of the Interior shall issue to the said company patents for so many sections of the land herein granted within the limits above named, and coterminous with said completed section hereinbefore granted; . . ."

"SEC. 8. *And be it further enacted*, That said Pacific Railroad Company, southern branch, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas, south through the Indian Territory, with the consent of the Indians, and not otherwise, along the valley of Grand and Arkansas rivers, to Fort Smith, in the State of Arkansas; and the right of way through said Indian Territory is hereby granted to said company, its successors and assigns, to the extent of one hundred feet on each side of said road or roads, and all necessary grounds for stations, buildings, work-shops, machine-shops, switches, side-tracks, turn-tables, and water-stations.

"SEC. 9. *And be it further enacted*, That the same grant[s] of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: *Provided*, That said lands become a part of the public lands of the United States."

The bill averred that the road was constructed through the Indian Territory, and set forth at length Indian treaties and Congressional legislation with reference to that Territory, under which it was alleged that the Creek Indian Nation had ceased to occupy or claim the lands in question as a tribe or nation, and that some of the lands had been allotted in severalty to individual members of the Creek Nation; and that thereby said lands passed to the State under the provisions of the grant mentioned. It was prayed that a decree be entered adjudging the State to be the owner, as trustee for the railway company, of all odd-numbered sections of land to the extent of the grant along the line of the road through the Creek Nation, in the Indian Territory, and that the allottees be directed to surrender the possession to the State as trustee and be enjoined from disposing of said lands, or "in the event that from any equitable considerations the court shall entertain the view that the allottees and those claiming under them should not be disturbed, then that an account be taken of the value of the lands in controversy," and that the United States be adjudged to pay to the State as trustee the sum of such values, estimated at more than $10,000,000.

In our opinion it appears upon the face of the bill that the State of Kansas is only nominally a party, and that the real party in interest is the railroad company. Section 3 provided that patents should be issued not to the State but to the company direct, which made the State nothing but a mere conduit for the passage of title. And this is so even if it were ruled that the State of Kansas was made trustee under section 9, because it would only be trustee of the bare legal title. In very many cases "in which the grant was directly to the railroad company, or in which the act of Congress required that the patents for lands earned should be issued, not to the State for the benefit of the railroad company, but directly to the company itself," it has been held that the title vested absolutely in the railroad company. *Sioux City &c. Railroad Co.* v. *United States*, 159 U. S. 349, 363.

Title passed by the grant on the performance of its conditions and to the grantees to whom the patents were to be issued, and here section 3 provided that patents should issue not to the State but to the railroad company direct.

And if the lands in the Indian Territory could be held in any view to have been granted *in præsenti*, such grant was certainly not to the State of Kansas.

The road, in aid of which the grant was made to the State, extended no farther than the southern boundary thereof, and the patents were to be issued to the company. True, as declared in section 1, the road was to be constructed "with a view to an extension of the same through a portion

of the Indian Territory to Fort Smith, Arkansas," and that extension was authorized by section 8, but the lands referred to in section 9 were not lands in the State of Kansas, nor was that State mentioned in the section. It seems clear that those lands were not intended to be granted to that State for the construction of a road beyond its boundaries.

Moreover, the bill sets forth many communications and protests by the railroad company to the Dawes Commission, the townsite commission, the Indian agent and the Secretary of the Interior, in all of which the tracts in controversy were claimed by the railroad company as its own without reference to any interest of the State of Kansas therein.

In these circumstances we think it apparent that the name of the State is being used simply for the prosecution in this court of the claim of the railroad company, and our original jurisdiction can not be maintained.

Again, the United States is the real party in interest as defendant and has not consented to be sued, which it can not be without its consent. *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387; *Oregon* v. *Hitchcock*, 202 U. S. 60; *United States* v. *Lee*, 106 U. S. 196, 207.

"If whether a suit is one against a State is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered."

In the present case the parties defendant other than the United States and its officers are Creek Indian allottees and persons claiming under them, and if their allotments should be taken from them, which is part of the relief sought by the bill, the United States would be subject to a demand from them for the value thereof or for other lands, while the bill prays in the alternative that "in the event that from any equitable considerations the court should entertain the view that the allottees and those claiming under them should not be disturbed, then that an account be taken of the value of the lands in controversy at the time of the respective allotments, and the defendants, the United States of America, be ordered, adjudged, and decreed to pay to your oratrix, as trustee, the sum of such values."

It does not follow that because a State may be sued by the United States without its consent, therefore the United States may be sued by a State without its consent. Public policy forbids that conclusion.

In *United States* v. *Texas*, 143 U. S. 621, 646, it was held that the exercise by this court of original jurisdiction "in a suit brought by one State against another to determine the boundary line between them, or in a suit brought by the United States against a State to determine the boundary between a Territory of the United States and that State, so far from in-

fringing, in either case, upon the sovereignty, is with the consent of the State sued. Such consent was given by Texas when admitted into the Union upon an equal footing in all respects with the other States." That case was quoted from with approval in *Minnesota* v. *Hitchcock, supra*, where Mr. Justice Brewer, delivering the opinion, pointed out that the judicial power of the United States extends to cases in which the United States is a party plaintiff as well as to cases in which it is a party defendant, for " while the United States as a government may not be sued without its consent, yet with its consent it may be sued, and the judicial power of the United States extends to such a controversy."

We are not dealing here with the merits of the controversy raised by the bill, but solely with the question of the original jurisdiction of this court. And as the United States has not consented to be sued, it results that on this ground also the bill must be dismissed.

*And it is so ordered.*

Mr. Justice MOODY took no part in the disposition of this case.

True copy.

Test:

*Clerk Supreme Court, U. S.*